VOL. 39 (2d Series) FEBRUARY 9, 1973 No. 1

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(39 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 39 (2d Series)

Pages 1 to 122

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON, D.C.

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Washington, D.C. 20402 - on a subscription basis

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F.C.C. 72-1012

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Revision of
AMENDMENT REQUIREMENTS FOR PENDING CABLE TELEVISION APPLICATIONS AND PLEADINGS

NOVEMBER 9, 1972.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), ROBERT E. LEE, H. REX LEE, REID AND WILEY, ISSUED THE FOLLOWING PUBLIC NOTICE.

REVISION OF AMENDMENT REQUIREMENTS FOR PENDING CABLE TELEVISION APPLICATIONS AND PLEADINGS

On September 14, 1972, the Commission issued a Public Notice entitled *Amendment Requirements for Pending Cable Television Applications and Pleadings*, FCC 72-825, — FCC 2d —. In that notice, the Commission stated which of its amendments to the cable television rules adopted in its *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, would be applied retroactively to applications and pleadings filed before the effective date of the *Reconsideration*, July 14, 1972, and which would not.

In that Public Notice, the Commission stated that Section 76.13(b)(2) of the Commission's Rules would not apply retroactively. In view of the need for the information contained in FCC Form 325, the Commission has now determined that Section 76.13(b)(2) of the Rules will be applied retroactively to March 31, 1972. Consequently, all applications filed on or after March 31, 1972, should be amended to supply the information required by Section 76.13(b)(2) of the Rules.

F.C.C. 73-7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Petition by
ANDREA RADIO CORP., LONG ISLAND CITY, N.Y.
For Waiver of the Comparable Tuning
Rules (Sec. 15.68)

JANUARY 4, 1973.

Mr. EMIL JOSS,
Vice President, Engineering, Andrea Radio Corp., 27-01 Bridge Plaza North, Long Island City, N.Y.

DEAR MR. JOSS: This concerns a progress report filed by Andrea on May 12, 1972, which was treated as a petition for waiver of the comparable tuning rules (47 CFR 15.68), and your supplementary letter of October 17, 1972. The waiver requested would permit the production. until January 1, 1974, of one television receiver model which combines a non-remotable Sarkes Tarzian 70-position UHF detent tuner with a remoted VHF tuner.

Prior to July 1, 1972, Andrea produced three receiver models, including a 25″ model equipped for VHF remote control operation. The remote control model accounted for 25% of sales. Early in 1970, Andrea began planning for remoted UHF tuning. Original planning called for use of the Sickles-Hopt remotable six-position UHF tuner which Hopt subsequently decided not to produce. Andrea then obtained and tested a number of varactor tuners. However, each of these tuners presented engineering problems; an attempt to remote the Sarkes Tarzian 70-position tuner was unsuccessful; and, by July 1, 1972, Andrea had ceased production of the remote control model, continuing to produce two models, neither of which was equipped for comparable tuning. Andrea now requests permission to introduce a new 25″ color model with remoted VHF tuning and a non-remoted 70-position Sarkes Tarzian tuner. This model is expected to account for 50% of sales. Andrea would accept from Tarzian only tuners meeting the ±3MHz tuning accuracy standard. They plan to convert this model for use of a remoted UHF varactor tuner by January 1, 1974. As of July 1, 1973, they expect to have replaced the other two models with models which comply with the comparable tuning rules. Thus plans call for 67% compliance by July 1, 1973 and 100% compliance by January 1, 1974. A waiver of the percentage of models requirement through June 30, 1973, and of the "new model" requirement through December 31, 1973, would be required to accommodate these plans.

Waivers involving the combination of a remoted VHF tuner and a non-remoted UHF tuner were recently granted to General Electric and Packard Bell. In both cases, however, the companies were producing sufficent numbers of comparable models to comply with the percentage of models requirement and required a waiver only because

the remoted receivers were "new models" within the meaning of the comparable tuning rules. Andrea, on the other hand, has never produced a comparable model and, if the waiver is granted, will not achieve compliance with the percentage of models requirement until July 1, 1973. (Because of the small number of models produced, the company has not until now been affected by the percentage of models requirement.) This is an important distinction. If a waiver request on these facts were presented by a larger firm with more adequate technical resources which was planning for minimal compliance with the regulations and was better able to sustain the financial losses involved, we would be disinclined to grant the relief requested. However, Andrea is a small firm. It appears to have made a considerable, good faith effort to achieve compliance, and has failed for lack of adequate technical resources. It now plans for 100% compliance six months ahead of the date upon which full compliance is required. In view of the firm's financial position, enforcement of the rules to prohibit 50% of prospective sales would work an extreme hardship on the company. On these facts, we are disposed to grant the request.

Accordingly, Andrea is hereby authorized to combine a nonremotable 70-position UHF tuner with a remoted VHF tuner in units of one receiver model through December 31, 1973, and to count that model toward compliance with the 40% of models compliance figure through June 30, 1973.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72–1003

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of AVCO BROADCASTING CORP. For Renewal of License for Station WOAI–TV, San Antonio, Tex.	File No. BRCT–45

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 15, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS DISSENTING.

1. The Commission presently has before it for consideration (i) the above-captioned license renewal application for Station WOAI–TV, San Antonio, Texas, filed by Avco Broadcasting Corporation (Avco); (ii) a timely petition to deny that application, filed July 1, 1971, by the Bilingual Bicultural Coalition on Mass Media (Coalition); (iii) Avco's opposition to the petition to deny, filed August 31, 1971;[1] and, (iv) the Coalition's "Motion to Accept Supplemental Petition to Deny", filed October 26, 1971.[2]

2. The license of Avco for Station WOAI–TV, San Antonio, Texas, expired August 1, 1971. Action on the renewal application was deferred pending consideration of the allegations raised by petitioners in this proceeding.

3. The Coalition, which is composed of representatives from numerous community organizations, "was created specifically to work with the mass media, including broadcasters, and the Community which the Coalition represents and to facilitate a dialogue between the mass media and the Community. . . ." Therefore, the Coalition bases its standing on its claim of being a responsible representative of the listening public. We conclude that the Coalition has standing under Section 309(d)(1) of the Communications Act of 1934, as amended. *Office of Communications of United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (1966).

4. Avco raises a question concerning compliance of the petition to deny with the procedural requirements of Section 309(d)(1) of the Act, and Section 1.580(i) of the Commission's Rules. Both sections require a petition to deny to be supported by an affidavit of a person or persons with personal knowledge of the facts alleged. Since the instant petition to deny is unsupported by any affidavits, it is clearly

[1] On July 21, 1971, the Commission extended the time for filing the opposition until September 1, 1971.

[2] On September 20, 1971, the Commission extended the time for filing the reply until October 12, 1971. On October 12, 1971, the Coalition filed a "Motion for Extension of Time" to file a supplemental petition to deny. This motion was denied by the Commission on October 18, 1971, FCC 71–1078. However, the date for filing the reply was extended until October 26, 1971. No reply has been filed. Instead the petitioner filed the instant motion accompanied by a "Supplemental Petition to Deny".

defective under the terms of the statute and will be dismissed as a formal pleading. Nevertheless, due to the nature of the matters raised by the Coalition, we have elected to treat the petition as an informal objection filed pursuant to Section 1.587 of our rules.

5. The Coalition's "Motion to Accept Supplemental Petition to Deny" raises another procedural question. On October 18, 1971, we denied the Coalition's request for an extension of time to file a supplemental petition to deny. Footnote 2, *supra*. Nonetheless, the Coalition filed its supplemental petition to deny accompanied by a motion that it be accepted. In so doing, the Coalition contends that the Commission's letter of October 18, 1971, did not forbid introduction of this supplemental petition, but only denied an extension of time to prepare it. Such a petition, however, is not permitted by the Commission's rules, which limits pleadings to the petition to deny, an opposition, a reply, and such other pleadings as may be authorized by the Commission. Therefore, the filing of such a pleading requires specific authorization by the Commission. This authorization has not been granted and the Coalition has failed to provide any substantial reasons why we should now permit the filing of its supplemental petition. Nevertheless, we have examined the supplemental petition to deny to determine if it contains such information as would require our consideration in this proceeding. The essence of the Coalition's supplemental petition is that an affidavit by an employee of license ". . . was not a fair representation of the whole truth." Instead, the Coalition alleges that "[t]he Station's threat of loss of employment . . . [was] . . . a significant reason in his [the employee's] decision to execute Affidavit." However, the only support for the Coalition's allegations is an affidavit of Ruben Sandoval, Chairman of the Coalition's legal department, who states that the employee involved told him that he was coerced into making an affidavit by the threat of loss of his job. Mr. Sandoval further states that the employee agreed to sign an affidavit refuting his original affidavit as contained in the licensee's opposition. Mr. Sandoval states, however, that individual has evaded him and has not made such an affidavit attesting to this allegation. In short, therefore, this allegation is based solely upon hearsay evidence. The allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by general affidavits, are not sufficient to require an evidentiary hearing. Also, it is noted that Mr. Santos is no longer employed by WOAI–TV and, consequently, we fail to understand why he is now reluctant to withdraw his initial affidavit if, in fact, that affidavit was executed because of a threat of a loss of employment. Thus, we conclude that there is no substantial merit to the Coalition's supplemental petition.

6. The Coalition bases its request for denial of the renewal of WOAI–TV's license on the station's failure to meet its public interest obligations in four areas. Briefly, the Coalition alleges that Avco has (i) failed to ascertain the problems of the public, in general, and Mexican-Americans, in particular; (ii) failed to maintain employment practices which avoid discrimination; (iii) violated Commission rules concerning the availability of a public file; and, (iv) demonstrated lack of good character by threats and harassment.

ASCERTAINMENT

7. Initially, the Coalition notes that WOAI–TV's renewal application lists five Advisory Conferences held at the station's studios, and that such conferences were attended by 28 Mexican-Americans. However, the Coalition points out that during the six months prior to the filing of WOAI–TV's renewal application, the licensee contacted only 27 persons, of whom only eight or 25.9% were Mexican-American. The Coalition maintains that this small number of persons interviewed is insufficient in view of San Antonio's total population of 830,000. The Coalition notes further that two individuals, Rosie Castro and Felix Guerra who are listed as persons periodically contacted by the station, were not, in fact, contacted periodically. Rather, the Coalition asserts that they were contacted only once about a news item concerning a school boycott. Finally, the Coalition submits that in a prior to license renewal, in order to determine community needs." Station may not limit its interviews to a few individuals but must sample the entire community, its establishment, its academic levels, and its social activities."

8. Avco submits, and we agree, that the Coalition, by its failure to mention all of Avco's ascertainment procedures, has ignored the comprehensive nature of Avco's efforts. The 27 individuals which the Coalition alleges were the only ones contacted by Avco during the six months preceding the filing of the renewal application appear in a list in Avco's renewal Exhibit No. 3 under the heading "Community Contacts". However, it is clearly stated in the sentence immediately preceding this list that "[i]ncluded in this exhibit are examples of the kinds of people who were interviewed, six months prior to license renewal, in order to determine community needs." Immediately following the list of 27 individuals is the notation, "For further details, see Exhibit 3.13." Exhibit 3.13 indicates that 84 individuals were contacted in the six months preceding the renewal application. Furthermore, 34 of these individuals or about 40% were Mexican-Americans. Avco's renewal application indicates that approximately 42% of the population is Mexican-American while the Coalition submits that about 48% of the population is Mexican-American. We believe it is unnecessary to resolve the statistical discrepany since we do not require licensees to consult with minority groups in proportion to their percentage of the total population. In this regard, we stated in the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971), that low representation of a particular group in the ascertainment process would not make a showing defective. Further, ". . . we believe the question should be one of representativeness, not one of specific numbers. However, it should be noted that it is impossible to require a one-to-one ratio in terms of numbers because most people belong to several groups, and because groups vary widely as to their membership." *Primer*, *supra*, at p. 668.

9. In addition to the 84 individuals consulted by Avco during the six months preceding its renewal application, we note some of the procedures utilized in establishing and maintaining a continuing dialogue with the people of its service area. In the *Network Program-*

ming Inquiry of July 1969, FCC 60–970, 25 F.R. 7291, 20 RR 1901, the Commission stated, ". . . the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service." In furtherance of this obligation, beginning in April 1970, WOAI–TV conducted a series of five Advisory Conferences ". . . to develop community needs, as presented by the conferees, *by developing and delivering programming which would aid in resolving some of these community problems.*" The first conference included 35 citizens representing a cross section of the population including 12 Mexican-Americans. Two youth conferences involved participation with 93 high school and college students, including 24 Mexican-Americans. The Mexican-American Advisory conference was attended by 28 leaders of the Mexican-American community and the Drug Conference was attended by 15 persons representing medicine, education and law enforcement. At each conference a list of community problems was developed. An outgrowth of the Drug Conference was the establishment of the WOAI–TV Drug Advisory Council which meets monthly to discuss drug related problems as they can be related to station involvement. A further method used by Avco to maintain a personal dialogue with community leaders is the solicitation of community contact reports. Department heads and supervisory employees are encouraged to contact the public to seek out community needs and report them to the station management. In this connection, WOAI–TV contacted some 67 Mexican-Americans between October 1, 1969, and February 1, 1971. WOAI–TV also maintains a Speakers Bureau to supply speakers for meetings or functions in the San Antonio area. These speakers distribute survey forms to their audiences in a further effort to ascertain the community's needs.

10. As a result of these and other methods of ascertainment, the licensee determined numerous community problems. Renewal Exhibit 4 lists the following as the top priority problems:

1. Work for equal educational opportunities for all students.
2. Stress the need for more vocational education.
3. Increase bi-lingual education in San Antonio schools.
4. Increase job opportunities for hard core unemployed and encourage a more industrial economy.
5. Increase awareness of the problems and projects of local, state and national government.
6. Promote law, order and safety of all citizens.
7. Provide more neighborhood health services and increase supply of nurses for existing facilities.
8. Stress the dangers of drug misuse.
9. Stress the importance of anti-pollution measures.
10. Publish farm and ranch information and explain farm problems for consumers.
11. Continue to promote spiritual awareness.
12. Present cultural programs relevant to all citizens of the South Texas area and promote better understanding between all ethnic groups.
13. Stress the need for improved drainage, street, sewers and transportation facilities for all citizens of San Antonio.
14. Assist persons in the poverty criteria and the handicapped in order to have a better life.
15. Offer a meaningful thrust of development for low income housing.

Avco proposes to meet these needs with specific programs. Among those proposed in the category of "public affairs", for example, are the following:

"TV–4 Jobs", a weekly 30-minute program relating to job opportunities (Need 4).
"Minority Forum", a twice monthly discussion program with leaders of minority communities (Needs 1–3, 7 & 13).
"Generation", a monthly 30-minute program directed to problems of high school and college students (Needs 1, 3, 5, 6, 9, 12 & 13).
"Conversation", a monthly 30-minute discussion program of current topics (Needs 6, 8, 9, 12 & 14).
"The Drug Scene", a monthly 30-minute program aimed at drug prevention and rehabilitation (Needs 7 & 8).
"Adelante", a daily 15-minute program discussing problems encountered by Mexican-Americans (Needs 2, 3, 4, 7, 12, 13 & 14).
"Conflict", a discussion of controversial issues.
"Report From Austin", special programs prior to and during legislative sessions concerning actions of State Legislators (Need 5).
"RFD Newsreel", a weekly 15-minute program of farm and ranch news (Need 10).

11. On the basis of all of the information submitted in Avco's renewal application and its opposition pleading, some of which has been detailed above, we conclude that the number and character of persons interviewed, the problems ascertained, and the programs proposed satisfy our requirements. Accordingly, there are no substantial and material questions of fact with regard to Avco's ascertainment which require further inquiry in a hearing.

EMPLOYMENT

12. In the area of employment policies and practices the Coalition alleges that WOAI–TV has violated Section 73.680 of the Commission's Rules. Specifically, the Coalition alleges that the station does not employ Mexican-Americans in direct proportion to their percentage of the total population of San Antonio. Thus, while San Antonio has a total population of 830,000, of which 48% is Mexican-American, it is noted that only 12% of the station's 85 employees are Mexican-American. This indicates, according to the Coalition, that the station is practicing "*de facto* segregation." Further, the Coalition alleges that the station "practices patronismo segregation, in that none of its administrators, managers, officials and decision-makers in higher positions of responsibility are Mexican-American." The Coalition acknowledges that WOAI–TV conducts an informal but effective training program, and, thus, has the means to establish parity in employment. However, the Coalition concludes that failure to establish parity in employment indicates the station is not making a good faith effort to recruit and train Mexican-Americans. Further, the Coalition alleges that 12% Mexican-American employment is a "deceptively inflated" statistic, since one of the persons listed in its renewal application, Judy Chapa, had quit her job months before the application in disgust over treatment of her by the Station. The Coalition also alleges that none of the Mexican-American employees at the Station are members of organizations responsible to the Community. Finally, the Coalition alleges that the station has relegated its Mexican-American

news reporter to menial duties, has restricted him to unimportant news items and uses him ". . . to cover Mexican-American activities which the Station deems subversive for the purpose not of news coverage but merely to gather information for the Station to pass on to the establishment."

13. Section 73.680 of the Commission's Rules requires television licensees to afford equal opportunity in employment to all qualified persons, and to "establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice." The Coalition's conclusion that these rules necessarily require employment of ". . . a percentage of Mexican-American employees which approximates the percentages of Mexican-Americans in the total population" is erroneous. In this connection, we stated in *Scripps-Howard Broadcasting Company*, 31 FCC 2d 1090 (1971):

> The Commission does not requires its licensees to employ numbers of minority groups in direct proportion to such groups' percentage of population in the community. In other words, the Commission does not require broadcasters to observe a quota system in their employment practices. The Commission does require that licensees make every effort to eliminate racial considerations from influencing hiring and promotional practices. . . .

14. As we stated in *The Evening Star Broadcasting Company* (WMAL–TV), 27 FCC 2d 240 (1971), *affirmed sub nom., Chuck Stone* v. *Federal Communications Commission*, D.C. Cir., Case No. 71–1166 (June 30, 1972), *rehearing denied*, September 1, 1972, simply indicating the number of minorities employed by a licensee, without citing specific instances of discrimination or showing a conscious policy of exclusion, is insufficient to warrant designating a license renewal application for evidentiary hearing. There is no showing of specific instances of discrimination or a conscious policy of exclusion in this proceeding which would require an evidentiary exploration into Avco's employment policies and practices.

15. Further, while an extremely low rate of minority employment may raise questions requiring appropriate administrative inquiry, *Chuck Stone* v. *Federal Communications Commission*, *supra*, such is not the case in this proceeding. Rather, the facts in this proceeding disclose that the number of minorities employed by Avco fall within a range of reasonableness when considered in conjunction with the number of minorities in the San Antonio standard metropolitan statistical area, which is comprised of 44 percent Spanish-surnamed Americans and eight percent Negro and other minorities.

16. Hence, a review of Avco's annual statistical employment profile reports (FCC Form 395) reveals that in 1971 WOAI–TV had 85 full-time employees of whom 11 were Spanish-surnamed Americans and four were Black. Thus, minorities represented 17.7 percent of the station's total full-time workforce. Moreover, of the 11 full-time Spanish-surnamed American employees, four were professionals, two were technicians, three were office and clerical and two were laborers. Similarly, a review of Avco's annual statistical profile report for 1972 reveals that WOAI–TV had 90 full-time employees of whom 16 are Spanish-surnamed Americans and three are Black. Thus, of the station's full-time workforce, 21.1 percent are minorities. Also, of these

minority employees, three are professionals, three are technicians, one is a sales worker, four are office and clerical, and five are semi-skilled operatives.

17. It is also noteworthy that WOAI–TV has, on at least three occasions, hired qualifiable Spanish-surnamed Americans and trained them for positions of responsibility. These positions included an on-the-air news reporter, a news reporter-photographer, and an Assistant Community Services Director. Additionally, Avco has developed an affirmative action program designed to assure nondiscrimination in its employment policies and practices. Among the practices listed by Avco in WOAI–TV's license renewal application (Section VI) to assure nondiscrimination in recruiting are the placement of advertisements in media which have a significant circulation in the minority community, recruitment of schools and colleges with significant minority group enrollments, and maintaining systematic contacts with many minority-group organizations in the community. No facts have been submitted which would disclose that Avco's employment policies and practices contain barriers to equal opportunity in employment or that the licensee is not exercising good faith in implementing its equal employment opportunity program.

18. On the basis of the foregoing, we conclude that the coalition has failed to raise a substantial and material question of fact regarding Avco's employment policies and practices which warrant exploration in an evidentiary hearing. Further, with regard to the Coalition's other allegations, we believe that its assertion that Avco's employment statistics are inflated is misplaced. WOAI–TV's license renewal application makes no mention of Judy Capa in any section concerning the station's employment policies and practices. Further, the Coalition's charge that WOAI–TV's Spanish-surnamed American employees do not belong to organizations responsible to the community is irrelevant to our consideration of the station's employment policies and practices. If the station were to require membership in certain organizations as a condition of employment, as the Coalition seems to suggest, it would then be setting up artificial barriers to employment which could be in violation of our rules. Finally, we conclude that the Coalition's charge, that WOAI–TV's Mexican-American news reporter is relegated to menial duties is without merit. The charge is unsupported by any factual evidence and is refuted by a sworn affidavit of Mr. Richard Santos, the station's Mexican-American news reporter to whom Avco believes the Coalition's charge refers.

PUBLIC FILE

19. The Coalition, in its petition, also charges Avco with failure to provide its representatives with access to WOAI–TV's public file and, in this respect, alleges that the licensee's conduct (i) violates Section 1.539 of the Commission's rules, 47 C.F.R. 1.539, and (ii) constitutes harassment of citizens' participation in broadcasting, demonstrating lack of good character. In its reply, however, the Coalition withdraws these charges since supporting affidavits from its representatives could not be obtained. Accordingly, although the pleadings otherwise indicate that Avco made available to the Coalition's representatives

WOAI–TV's public file within a few minutes of their request, in view of the Coalition's withdrawal of its charges no further discussion of this aspect of the instant proceeding is warranted.

CONCLUSIONS

20. Section 309(d) of the Communications Act provides for granting renewal applications where the Commission finds, after full consideration of all pleadings, that there are no substantial and material questions of fact that a grant of the applications would be consistent with the public interest. Section 309(d) also provides that where a petition to deny is filed it must contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. Where the Commission finds that such a showing has not been made, it may deny the petition. Accordingly, based upon our review of Avco's renewal application and all the pleadings filed in this proceeding, we find that the coalition has failed to raise substantial and material questions of fact which establish a *prima facie* case for denial of WOAI–TV's license. We also find that a grant of Avco's license renewal application for WOAI–TV would serve the public interest, convenience and necessity.

21. In reaching our conclusions, we are not unaware of the concern being expressed by minority groups about the responsiveness of the broadcast media to their local problems. The Commission, of course, cannot waive or ignore the pleading standards set forth in Section 309(d) of the Act to accommodate petitioners. Clearly, if members of the public choose to wait until the end of a license term and then petition to deny renewal of license, they must meet the strict requirements of Section 309(d). This does not mean however that community groups are left without the means to improve local broadcast service. We have found that cooperation at the local level is the best and most effective method of resolving local problems and improving local service. Accordingly, we wish to reaffirm our prior expression of policy approving community-broadcaster discussions *throughout the license terms.* Obviously, while under an obligation to ascertain and program for community problems, no broadcaster can be aware of everyone's needs all the time. Therefore, interested members of the public who feel a station's performance is inadequate should so advise the broadcaster to give him the opportunity to consider their ideas and suggestions. Such discussions will be more effective if conducted throughout the license term and not only at renewal time.

22. In view of the foregoing and upon review of Avco's renewal application for WOAI–TV, we conclude that Avco is legally, technically, financially and otherwise qualified to remain a licensee and that a grant of its renewal application would serve the public interest, convenience and necessity.

23. Accordingly, IT IS ORDERED, That the "Motion to Accept Supplemental Petition to Deny" filed by the Bilingual Bicultural Coalition on Mass Media, IS DENIED.

24. IT IS FURTHER ORDERED, That the "Petition to Deny" the license renewal application of Avco Broadcasting Corporation for Station WOAI–TV, IS DISMISSED and when considered as an informal objection IS DENIED.

25. IT IS FURTHER ORDERED, That the license renewal application of Avco Broadcasting Corporation for Station WOAI–TV, IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-49

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CAPITOL DISTRICT BETTER T.V., INC., VILLAGE OF COLONIE, N.Y. CAPITOL DISTRICT BETTER T.V., INC., TOWN OF COLONIE, N.Y. For Certificates of Compliance	CAC-75; CSR-113; CSR-140 NY335 CAC-76; CSR-114; CSR-141 NY336

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE CONCURRING IN THE RESULT.

1. On March 31, 1972, Capitol District Better T.V., Inc., filed an "Application for Certificate of Compliance Pursuant to Section 76.13(b) of the Rules" (CAC-75) in which it proposed to operate a new cable television system at Village of Colonie, New York, and an "Application for Certificate of Compliance Pursuant to Section 76.13(b) of the Rules" (CAC-76) in which it proposed to operate a new cable television system at Town of Colonie, New York, both communities being in the Albany-Schenectady-Troy television market (the 34th largest). Objections to these applications were filed by Albany Television, Inc., licensee of Television Broadcast Station WTEN, Albany, New York, and by Sonderling Broadcasting Corporation, licensee of Television Broadcast Station WAST, Albany, New York. In addition, Faith Center, licensee of Station WHCT-TV, Hartford, Connecticut, filed a "Petition for Carriage" pursuant to Section 76.7 of the Commission's Rules. Thereafter, Capitol filed an "Amendment and Reply" for each application August 17, 1972, and Albany Television filed a "Response to Request for Special Relief."

2. The only contested issue regarding the amended applications relates to signal carriage. Capitol first proposed to carry the following television signals on its systems: WAST (ABC), and WTEN (CBS), both Albany, New York; WRGB (NBC), and WMHT (Educ.), both Schenectady, New York; WSBK-TV (Ind.), Boston, Massachusetts; and WOR-TV (Ind.) and WPIX (Ind.), both New York, New York. This proposal was challenged by the Albany television licensees as inconsistent with Section 76.61(b)(2) of the Rules[1] since the two

[1] Section 76.61(b)(2)(i) of the Rules provides that, "For the first and second additional signals, if any, a cable television system may carry the signals of any independent television station: *Provided, however,* That if signals of stations in the first 25 major television markets (see § 76.51(a)) are carried pursuant to this subparagraph, such signals shall be taken from one or both of the two such closest markets, where such signals are available. If a third additional signal may be carried, a system shall carry the signal of any independent UHF television stations located within 200 air miles of the reference point for the community of the system (see § 76.53), or, if there is no such station, either the signal of any independent VHF television station located within 200 air miles of the reference point for the community of the system, or the signal of any independent UHF television station.

NOTE: It is not contemplated that waiver of the provisions of this subparagraph will be granted.

closest markets in the first 25 major markets are Boston and Hartford, where WHCT–TV is located. Consequently, Section 76.61(b)(2) of the Rules would prohibit importation of independent signals from New York City, the third closest market. Capitol argued that WHCT–TV's programs are heavily religious and that it should not, therefore, be considered as an independent station. During the pendency of these applications, the Commission considered and rejected this argument, par. 21, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 334, and, thereafter, Capitol amended its applications to propose carriage of WHCT–TV [2] and a waiver of the rules to allow it nonetheless to carry WOR–TV, WPIX, and WSBK–TV—a total of four rather than three independent signals.

3. In support of its waiver request, Capitol argues (a) that WHCT–TV's programs are limited both in duration and content, hence ineffective "to get cable moving"; (b) that the public interest places a premium on in-state New York City signals for Albany viewers; (c) that there is a community of interest between residents of Albany and New York City which does not exist with respect to out-of-state cities; and (d) that grant of the relief requested would not have an adverse impact on Albany market stations. We rule on Capitol's arguments as follows: (a) Faith Center has demonstrated that it carries a variety of nonreligious programs (for single example, New York Yankee baseball games) of general interest. In these circumstances, we must reject Capitol's arguments lest we encourage unnecessary sameness of independent programs simply to reassure cable operations of the greater saleability of their service; (b)(c) Capitol has neither supported its allegations factually nor otherwise persuaded us of the great public interest in providing New York City programs to Albany; and (d) in view of our rulings on (a)–(c) above, this does not appear relevant. And even if it did, Capitol has not supported the argument. In these circumstances, Capitol's waiver request will be rejected.

4. Although not raised by the parties, it is clear that Capitol's franchises [3] are not entirely consistent with Section 76.31 of the Rules (for example, both are for twenty year terms). Consequently, although we find the franchises to be in substantial compliance with our policies, we will issue certificates of compliance only until March 31, 1977. E.g., *CATV of Rockford, Inc.*, FCC 72–1005, —FCC2d—. The remaining question for decision is—in view of our ruling in par. 3 above—the independent signals to be authorized to Capitol. Consistent with Section 76.61(b)(2) of the Rules, these will be: WHCT–TV (closest market in 25 major markets); WSBK–TV (2nd closest market in 25 major markets); and one independent UHF television station located within 200 air miles of the communities, which Capitol may select. A certificate of compliance will be issued when Capitol advises the Commission of its choice.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

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[2] Faith Center has only sought carriage of WHCT–TV—it does not seek enforcement of Section 76.61(b)(2) of the Rules.

[3] The franchise for Town of Colonie was issued August 27, 1964, and the franchise for Village of Colonie was issued October 28, 1968.

Accordingly, IT IS ORDERED, That the "Petition for Carriage" filed June 16, 1972, by Faith Center IS GRANTED.

IT IS FURTHER ORDERED, That the objections filed May 12, 1972, by Sonderling Broadcasting Corporation ARE GRANTED to the extent indicated above, and otherwise ARE DENIED.

IT IS FURTHER ORDERED, That the "Response to Request for Special Relief" filed August 30, 1972, by Albany Television, Inc., IS GRANTED to the extent indicated above, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That Capitol District Better T.V., Inc.'s applications (CAC–75; CAC–76) ARE GRANTED and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72–986

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
THOMAS M. SLATEN, BEVERLY HILLS, CALIF.
For Reconsideration of Grant of Review of Fairness Doctrine Ruling Re Stations KNX and KNX–FM

NOVEMBER 8, 1972.

AIR MAIL

MR. THOMAS M. SLATEN,
Post Office Box 5338,
Beverly Hills, Calif.

DEAR MR. SLATEN: The Commission has before it your "Petition for Reconsideration" requesting reconsideration of our action (34 FCC 2d 733) granting the application of Columbia Broadcasting System, Inc., for review of the Broadcast Bureau's ruling that Radio Stations KNX and KNX–FM had failed to comply with the fairness doctrine with respect to an editorial advocating reform of the California judiciary. In granting that review, we ruled that in light of additional facts submitted by CBS showing repeated attempts by the stations to obtain responsible representation of views contrasting with the position taken by their editorial, the licensee had made a reasonable effort, overall, to comply with the fairness doctrine and that, therefore, the Commission would not second-guess CBS's determination that you were not an appropriate spokesman to present a viewpoint on the issue of judicial reform.

We believe that the facts pertinent to this matter are fully and adequately set forth in our previous decision and therefore need not be repeated here.

You first assert that in granting the CBS application for review, the Commission erred in waiving provisions of Sections 1.106 and 1.115(c) of its rules to permit CBS to introduce for original consideration facts showing additional efforts made by KNX and KNX–FM to present viewpoints in contrast with that of their editorial. We find no such error, for Section 1.3 of the Commission's Rules provides that "Any provision of the rules may be waived by the Commission on its own motion . . . if good cause therefor is shown." It is manifest that such additional facts were plainly relevant and material to the issue before the Commission of whether the licensee, either before or after rejecting your offer of reply, had made a reasonable effort to present contrasting viewpoints. A proper determination as to the reasonableness of the licensee's overall performance under the fairness doctrine necessarily requires that all pertinent facts be before the Commission for review, and that administrative necessity will establish sufficient "good

cause" for waiver where no element of bad faith is evident. While we did admonish the licensee for its tardiness in submitting such additional facts, reminding it of its duty to respond fully to Commission inquiries, we did not then, nor do we now, find that any bad faith on its part was indicated.

Your petition next asserts that it was error for the Commission to consider such additional facts on the ground that this additional evidence "was not of probative value." Specifically, you contend that CBS's additional allegation of fact that KNX and KNX–FM had sent copies of the editorial to 550 individuals and groups in their service area with notice that reply time would be afforded responsible representatives of opposing viewpoints upon request was "unsubstantiated" and hence improperly considered. Since your petition presents no denial of the truth of the additional facts introduced by CBS, and does not allege any facts which might be taken to controvert those submitted by the licensee, your argument that such evidence was improperly considered must be rejected.

Finally, we note that your petition repeatedly attempts to direct our consideration to your qualifications as a potential spokesman on the issue of judicial reform and to the reasonableness of the licensee's refusal to accept your offer of reply. We must reiterate that the issue in this case is not one concerning the personal qualifications of individuals to present viewpoints on controversial issues of public importance or of any obligation on the part of the licensee to afford reply time to any particular group or individual.[1] In this regard, with exceptions not applicable here, no single group or person is entitled as a matter of right to present a viewpoint differing from that expressed on the station. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416 (1964). The issue properly before us here is rather whether the licensee, in its overall treatment of a controversial issue of public importance, has made a reasonable effort to obtain responsible representation of contrasting views. It has been determined that Stations KNX and KNX–FM did in fact take such reasonable steps to present contrasting viewpoints thereby complying with the fairness doctrine and that upon the facts here presented, the Commission will not substitute its judgment for that of the licensee in matters of spokesman selection. Your petition raises no new or relevant questions of material fact to prompt reconsideration of that decision.

In light of the foregoing, your petition for reconsideration IS DENIED.

Commissioner Johnson dissented and issued the attached statement; Commissioner H. Rex Lee abstained from voting.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

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[1] Similiarly, although our prior review of this matter took note of indications of personal animus existing between the parties, our ruling was in no way premised upon or influenced by that finding, nor do we deem such evidence relevant to any reconsideration here.

109–025—73——2

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

It would appear that the Commission majority is bent upon gutting the fairness doctrine even before its re-evaluation is complete. (see *Notice of Inquiry into the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications* Act, 30 FCC 2d 26, June 9, 1971). I refer to the dangerous trend in recent cases toward the finding that zero minutes of time devoted by a broadcaster to one side of a controversial issue can somehow constitute a "reasonable effort" on the part of the licensee. The Commission said as much last week, over my dissent, when it found that zero minutes of coverage of the Presidential campaign of People's Party Candidate Dr. Benjamin Spock by two major networks in the last three weeks of the campaign constituted "fairness." *Letter to People's Party*, ——— FCC 2d ——— (November 6, 1972). It does so once again in this case, by its decision that zero times given to the expression of views opposed to a CBS radio editorial can also, by some incomprehensible chain of logic, constitute a "reasonable effort."

In this case, CBS, the licensee of radio stations KNX and KNX–FM, Los Angeles, broadcast an editorial critical of the California judiciary on October 29, 1969. At the end of that editorial, I will assume the station added the usual trailer regarding the station's offer to broadcast "opposing views." In any event, licensee claims that it sent copies of the editorial, along with an offer of time to reply, to some 550 individuals and groups in its service area, but that none of the 550 responded. The only person to request time from the station to reply to the editorial was Thomas M. Slaten—and his request was refused. To all intents and purposes, then, the listeners of KNX–AM and FM were left with the impression that no one opposed the licensee's viewpoint, since zero time was allotted by the station to any other side. In my absence last April, the Commission found that CBS had not run afoul of the fairness doctrine. Today the majority refuses to reconsider that decision.

I dissent.

In its *Cullman* decision, 40 FCC 576 (1963), this Commission found that a station was required to make a *positive* effort to air views on controversial issues opposed to those already presented in the course of its programming. At the same time, the Commission stated that in all applications of the fairness doctrine, "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation." 40 FCC, at 577. *Nowhere*, however, has it been stated that a licensee, having presented one side of a controversial issue, could then exercise its "good faith, reasonable judgment" to refuse to devote *any* time to the other. Yet that appears to be the Commission's holding today.

What the majority in this case seems to forget is that the fairness doctrine was not designed for the benefit of the licensee, or even for the benefit of the party who claims the right to respond. It is for the benefit of the viewing or listening public, and represents the obligation of the licensee, the public trustee of the airwaves, to inform that public as to the various viewpoints that may exist on controversial issues.

This obligation is especially important when the viewpoint is one being directly advocated by the licensee itself.

When the whole question of editorializing by broadcast licensees was considered by this Commission in 1947, it was, in part, "to determine whether the expression of editorial opinions by broadcast station licensees on matters of public interest and controversy is consistent with their obligation to operate their stations in the public interest." The answer was *yes*, editorializing was consistent—but only so long as the licensee could ensure that opposing viewpoints were sufficiently represented to prevent an "overemphasis on the side of any particular controversy which the licensee chooses to espouse." *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). Thus, at a very early juncture, the Commission recognized the thin line it would have to walk between allowing a licensee to propagandize freely—with the incredible powers of the broadcast media—and stifling a licensee's First Amendment rights to freedom of expression. It sought a rather delicate balance between these conflicting factors, and the fairness doctrine was the result.

For the fairness doctrine to operate to protect the public interest, there must be some indication that the licensee has actually presented some aspect of each side of a controversial issue. Merely soliciting replies to on-air editorials cannot be a major factor in a station's "good faith effort" to comply with the fairness doctrine, whether CBS solicits from 500 or even 5000 persons or groups.

This Commission often plays numbers games over fairness issues, in which it attempts to decide such questions as whether six and one-half minutes of news coverage might sufficiently balance some 15 one minute spots. But one game that has not been played until now has been the determination that a licensee has made a sufficient "effort" at fairness on the basis of the weight of its "extra-broadcast" activities, when the time presented on the air has been zero.

I do not claim that CBS had an absolute obligation to air the particular views expressed by Mr. Slaten. It *did*, however, have an absolute obligation to inform the public of views on "the California judiciary" counter to its own by one means or another. Since there is not one scrap of evidence that CBS ever did so on its own, and Mr. Slaten *did* request time to reply to its editorial, I believe, in this instance, he should have been given that time. A contrary result would make a mockery of the fairness doctrine.

I dissent.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
LOS ANGELES CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN—LOS ANGELES, CALIF.
Concerning Fairness Doctrine Re Station KNX

JANUARY 17, 1973.

MS. GEORGIA FRANKLIN,
Los Angeles Chapter, N.O.W.,
8864 West Pico Boulevard,
Los Angeles, Calif.

DEAR MS. FRANKLIN: This is in response to your complaint filed on behalf of the Los Angeles Chapter of the National Organization for Women, stating that Station KNX has refused to comply with the fairness doctrine. Your letter, referring to a broadcast of December 22, 1971, did not reach the Commission until July 31, 1972. Because the staff was for many months swamped with complaints and inquiries related to the 1972 primaries, conventions and general elections, which would have become moot unless they were resolved at once, it was necessary to postpone consideration of many other complaints, and we are only now able to respond to some which we normally would have dealt with much earlier.

You state that KNX broadcast a program titled "Spectrum" on December 22, 1971 in which commentator Jeffrey St. John stated that the Women's Liberation movement "is largely a lie and a hoax," that its advocates present "dogmatic sloganeering" for their evidence, "and that Women's Liberation is a smokescreen for the advancement of Socialist-populist-political ideas."

You enclose copies of correspondence with Messrs. Ackerman and Nicholaw of CBS, the licensee of KNX, in which they state in substance that CBS has provided fair coverage on the subject of Women's Liberation, both in the "Spectrum" series and other broadcasts, including news programs. As examples of specific programs in which contrasting views were presented, Mr. Ackerman cites broadcasts on October 2, 1971 and January 4, 1972, by Shana Alexander and commentaries by Nicholas von Hoffman.

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting views in its overall programming, which, of course, includes statements or actions reported on news programs. No particular person or group is entitled to appear on the station, since it is the right of the public to be informed which

the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee has acted reasonably and in good faith. Where complaint is made to the Commission, the Commission expects a complainant to submit specific information including, *inter alia*, reasonable grounds for the claim that the station or network broadcast only one side of the issue in its overall programming.

In the present case you have not provided grounds for concluding, in light of the CBS responses, that KNX has failed to afford reasonable opportunity for presentation of views in contrast to those expressed by Mr. St. John. Accordingly, no further action by the Commission appears warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief*,
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ACCURACY IN MEDIA, INC., WASHINGTON, D.C.
Concerning Fairness Doctrine Re NBC

JANUARY 19, 1973.

ACCURACY IN MEDIA, INC.
501 13th Street NW.,
Suite 1012,
Washington, D.C.

Attention: Mr. Abraham H. Kalish, Executive Secretary.

GENTLEMEN: This will refer to your letter of complaint, dated August 21, 1972, concerning an NBC documentary program on the narcotics traffic in Southeast Asia which was presented on July 28 as part of the network's CHRONOLOG series.

You state that the documentary in question presented three controversial issues of public importance: (1) whether this country's Southeast Asian allies—Thailand, Laos, and Vietnam—are important sources of illegal heroin on the U.S. market; (2) charges that U.S. Government agencies have been involved in assisting those trafficking in narcotics in Southeast Asia and that the U.S. Government has not been aggressive in fighting such traffic for fear of hindering the war effort; and (3) charges that the governments of Thailand, Vietnam, and Laos are not fully cooperating in combating the narcotics traffic, charges which have led to legislative proposals to terminate foreign aid to those countries. You allege that "all these issues were deliberately treated in a manner that was intended to lead the viewer to the conclusion that America's allies were important sources of heroin for the American market, that the governments of Thailand, Laos, and Vietnam were not cooperating adequately in putting down the traffic and that U.S. agencies were themselves involved in supporting the traffic." You have further concluded that the program "fails to meet the Fairness Doctrine requirement that the licensee provide a balanced presentation of all sides in programming that deals with controversial issues of public importance."

You cite the following as indicating that NBC, in its news programming, has avoided presenting evidence which would lead to contrary conclusions concerning the issues in question: that NBC News failed to cover the Thai Government's destruction of 26 tons of opium on March 7, 1972 and later referred to such destruction in its documentary as a "well-publicized extravaganza"; that while NBC News did not cover General Lewis W. Walt's Congressional testimony of August 14, 1972, praising the anti-narcotics efforts of the Thai Government, the NBC program TODAY on that date featured a 5-minute

interview with author Alfred McCoy, who discussed his thesis that Southeast Asia has become a main source of illegal heroin bound for the U.S. and that both U.S. and Asian government officials are implicated in such traffic and hence are not taking steps necessary to halt it; that the documentary quoted a "professional estimate" that one-third of the illegal heroin in the United States is from Southeast Asia, ignoring other estimates which are much lower and which cite Turkey as the source of 80 per cent of the U.S. supply; that the documentary ignored a comparison which would have shown that Turkey, not Southeast Asia, has been the primary source of illegal narcotics and that the Thai, Laotian and South Vietnamese Governments have all moved more rapidly than Turkey in taking steps to curb the traffic; that while the documentary discussed charges that the CIA and U.S. military forces were involved in the narcotics traffic, no denial of such charges was presented; that while the documentary discussed charges that the U.S. government has deliberately ignored the narcotics problem in Southeast Asia to avoid any deleterious effect on the war effort, no official refutation of such charges was presented; and that while the documentary presented the views of three Congressmen advocating the termination of aid to Thailand because of its alleged failure to deal with the illegal narcotics traffic, no opposing views were presented.

You also state that the documentary presented a one-sided and misleading impression that the Communist governments of mainland China and North Vietnam have cracked down on narcotics traffic, making no mention of charges to the contrary.

You request that the Commission investigate the CHRONOLOG documentary and order NBC-owned stations and affiliates to offset the one-sided presentation of the program with appropriate contrasting views.

Where complaint is made to the Commission under the fairness doctrine, the Commission expects a complainant to submit specific information indicating, *inter alia*, the specific issue or issues of a controversial nature of public importance presented by the station or network; the basis for the claim that the issue or issues were controversial issues of public importance, either nationally or in the station's local area at the time of the broadcast; the basis for the claim that the station or network broadcast only one side of the issue or issues in its overall programming, and whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue or issues. The Commission also requires that a complainant first bring his fairness complaint to the attention of the station or network involved before seeking this agency's review.

In this connection the Commission notes that your letter to NBC concerning CHRONOLOG was not cast in terms of the fairness doctrine; in fact, it made no mention of the fairness doctrine and was almost exclusively concerned with the accuracy of the material presented and the ommission of facts which you believed should have been included. Thus, the letter appears to have been primarily a complaint on matters of news judgment and propriety of certain comments. The Commission has made clear that "As a public trustee, the broadcaster must scrupu-

lously eschew intentional and deliberate falsification (slanting or rigging) of the news." However, as you know, the Commission has stated many times that it will not substitute its editorial or news judgment for that of a licensee; that it is "not the national arbiter of the 'truth' of a news event" and that "It cannot properly investigate or determine whether an account or analysis of a news commentator is 'biased' or 'true.' " The Commission will make investigation of such charges only where it has received extrinsic evidence of deliberate rigging or slanting. See enclosed copy of *Letter to Mrs. J. R. Paul.*

Thus, the Commission cannot intervene in this case on the basis of your allegations that the documentary program was in part inaccurate or omitted certain facts which should have been included, or that the commentator drew unjustified conclusions.

Turning now to your letter to the Commission which is based upon the fairness doctrine, we note that although you state that NBC presented only one side of three controversial issues of public importance during the CHRONOLOG broadcast in question, you have not claimed that in its overall programming (which includes newscasts, interviews, round tables, debates and speeches) NBC has presented only one side of these issues. As you know, the fairness doctrine does not require a licensee to present contrasting views on a controversial issue in a single program or series of programs. What is required is that the station or network take affirmative steps to afford a reasonable opportunity for presentation of contrasting viewpoints on such issues in its overall programming. Moreover, the complainant is expected to "state the basis for the claim that the station has presented only one side of the question." See Part I of the Commission's Public Notice of July 1, 1964 titled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

Accordingly, it appears that on the basis of the information which you have submitted to the Commission, no further action on your complaint is at this time warranted.

The Commission regrets the delay in answering your letter. However, due to staff limitations and the increased workload of the Commission, particularly during the 1972 election campaigns, this response could not be prepared and forwarded until the present time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ANTHONY R. MARTIN-TRIGONA, CHAMPAIGN, ILL.
Concerning Fairness Doctrine Re Station WLS, Chicago, Ill.

JANUARY 22, 1973.

Mr. ANTHONY R. MARTIN-TRIGONA,
Box 2058, Station A,
Champaign, Ill.

DEAR MR. MARTIN-TRIGONA: This will refer to your letter of complaint, dated April 15, 1972, regarding two particular editorials broadcast by Standard Broadcast Station WLS, Chicago, Illinois. You state that the editorials in question "involved airline hijacking news treatment, and drugs" and that your written request for time to air "rebuttals" to these editorials was refused by the station for the stated reason that neither editorial dealt with a controversial issue. You also state that the editorial concerning news coverage of airline hijacking "flatly stated that a licensee policy of news censorship and management control of the news department had been implemented (by WLS) to control news." You object to this "stunning policy of censorship." You further state:

> . . . last year the Commission ruled favorably on a complaint I filed against the station. Since then, there has been a change in management at the station and I believe the new management is trying to harass me for having embarrassed the station and exposed news fraud. Under these circumstances the actions of the new managers is shocking and illegal and constitutes improper intimidation of a listener and consumer advocate.

You ask the Commission to review these matters under the fairness doctrine and to take appropriate action.

Where complaint is made to the Commission under the fairness doctrine, the Commission expects a complainant to submit specific information in support of his general allegation that a station has failed to comply with fairness. In addition to the particulars which you have furnished the Commission, the following specific information is required before any action may be taken: (1) the specific issue or issues of a controversial nature of public importance presented by the station (you generally state that the editorials in question concerned "airline hijacking news treatment, and drugs"; however, a more detailed and specific statement is needed to sufficiently identify the particular issue or issues which were presented and to which you refer); (2) the date and time when the editorials in question were broadcast; (3) the reasonable grounds for your claim that the issue or issues were controversial issues of public importance, either nationally or in the

station's local area at the time of the broadcasts (as in (1) above, a more specific statement is needed to clarify the particular subject and substance of your complaint); (4) the basis for your claim that the station has broadcast only one side of the identified issue or issues in its overall programming (an accurate summary of the particular view or views broadcast and presented by the station should be included); and (5) copies of your correspondence with the station or its licensee indicating the specific reasons for its refusal to comply with your request. Absent such detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees to disprove vague and general allegations such as those set forth in your instant letter. See *Allen C. Phelps*, 21 F.C.C. 2d 12 (1969). If, after communicating with the licensee regarding the above particulars of your complaint, you are not satisfied that it has fulfilled its obligations and the Commission is so advised in pertinent, factual detail, as set forth above, it will in appropriate cases request a statement from the licensee and provide the complainant with an opportunity to comment on the licensee's statement if the complainant so desires. Thereafter, on the basis of all available information, the Commission will attempt to determine whether the licensee's actions under the circumstances violated any rule or policy of the Commission.

It should be noted in this regard that although the fairness doctrine requires broadcast licensees to afford a reasonable opportunity for the presentation of contrasting views upon presenting one side of a controversial issue of public importance, it is the responsibility and within the discretion of the licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on that issue. The Commission will review fairness complaints only to ascertain whether the licensee can be said to have acted reasonably and in good faith in making such determinations.

With regard to your objection to the licensee's alleged policy of management control of the news broadcast by its station, it cannot be determined from the facts which you have submitted whether such licensee procedure is violative of any Commission rule or policy. You fail to state with sufficient particularity the specific licensee policy to which you refer and the basis or grounds for your allegation that such policy constitutes unlawful "censorship". Absent a more detailed statement of such particulars, no Commission action can be taken at this time. It should be noted, however, that as a general rule the Commission does "not sit to review the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste." *In re Complaints concerning Network Coverage of the Democratic National Convention*, 16 F.C.C. 2d 650, 654 (1969).

Your letter also fails to state any pertinent or relevant facts in support of your allegation that the management of WLS has been "trying to harass" you "for having embarrassed the station" in a matter previously before the Commission. It should be noted here that the station's refusal of your request for time to air "rebuttals" to its editorials does not in and of itself evidence any improper licensee conduct for the Commission has consistently ruled that the fairness

doctrine does not entitle any particular person or group to appear on a station as a matter of right. It is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of an individual to broadcast his own particular views.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

The delay in forwarding this response, due to staff limitations and the Commission's increasing workload, is regretted.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
DONALD C. SKONE-PALMER, TUJUNGA, CALIF.
Concerning Fairness Doctrine Re CBS
Television Network

JANUARY 23, 1973.

Mr. DONALD C. SKONE-PALMER,
7147 Apperson Street,
Tujunga, Calif.

DEAR MR. SKONE-PALMER: This is in reply to your letters of November 28 and December 10 and 28, 1972 concerning a complaint against CBS.

You state that the program called "Sixty Minutes" broadcast on the CBS television network at 6:00 p.m. on November 26, 1972, was "slanted, unfair, highly biased and impossible of proof"; and that the CBS reporters Morley Safer and Mike Wallace, for that segment of Sixty Minutes dealing with our involvement in Vietnam, referred to such involvement as "futile" and "immoral". You further state that you "wrote to CBS demanding some time to set the record straight and their answer was to excerpt some of my letter(s) in their next programs"; and that you subsequently wrote to CBS stating that the excerpting "was not enough and again demanded time to present your views."

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communicatons Act the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how

best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

Neither the Communications Act nor the Commission's Rules require the separation of interpretive comment from news, and the individual broadcast licensee is not required to label programs which interpret the news or contain expressions of opinion. Legislation designed to require broadcasters to identify the nature and source of the responsibility for editorial and interpretive comments has been considered by both Houses of Congress in the past, but none has been enacted.

Before the Commission can take appropriate action with respect to fairness doctrine complaints it must receive specific information setting forth reasonable grounds for the complainant's conclusion that a licensee in its overall programming has not attempted to present opposing views on controversial issues of public importance. *Allen C. Phelps*, 21 FCC 12, 13 (1969).

You have not provided any grounds for concluding that CBS in its overall programming has failed to afford reasonable opportunity for the presentation of views in contrast to those on the program in question.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
U.S. COALITION FOR LIFE, EXPORT, PA.
Concerning Fairness Doctrine Re Station
WBZ–TV, Boston, Mass.

JANUARY 17, 1973.

MS. RANDY ENGEL,
U.S. Coalition for Life,
165 Hills Church Road,
Export, Pa.

DEAR MS. ENGEL: This is in response to your letter with enclosures dated July 27, 1972, stating that Station WBZ–TV, Boston, broadcast a program on February 19, 1972 featuring a spokesman for an organization called Zero Population Growth, Inc., who advocated limiting births to two children or less and the need for birth limitation, and stressed "the crisis of overpopulation." You state that the questions of population and population explosion are issues of national importance as evidenced by the appointment of a Presidential Commission on Population Growth and the American Future, among other things. You state that you have received no answer to your request to the licensee of the station for an opportunity to present an opposing viewpoint on population.

Please excuse our delay in answering your letter. It came during the months when our limited staff was swamped with complaints and inquiries relating to the conventions, primary elections and the general election, which required immediate resolution lest they become moot. Thus, we were forced to defer consideration of many other complaints and are only now attempting to deal with them.

Although your complaint does not state specifically that it is based on the fairness doctrine, it is apparently so based, and will be considered in that light.

The fairness doctrine requires a broadcast licensee who presents one side of a controversial issue of public importance to afford reasonable opportunity for presentation of contrasting views. Contrasting views need not be presented on the same program or series of programs, provided that the licensee attempts to do so in its overall programming, which may include news programs, interviews, round table discussions, debates, speeches, etc. Nor does the fairness doctrine require the licensee to present any particular person or group as spokesman for a viewpoint, since the goal of Congress and the Commission is that the public be informed, rather than that any particular individual be afforded access to the air. The Commission's role is not to make such judgments, which are the responsibility of the licensee in this area, but only to determine whether the licensee has acted in good faith and

with reasonable judgment. The Commission's interpretation of the fairness doctrine and illustrative rulings are set forth in its Public Notice of July 1, 1964, a copy of which is enclosed.

You will note that in column 3 of the first page of printed text, the Notice states what information the Commission expects a complainant to furnish. Such information includes the basis for the complainant's belief that in its overall programming the licensee has not afforded reasonable opportunity for presentation of views in contrast to those which occasioned the complaint.

Since you have furnished no grounds for a conclusion that WBZ–TV has not in its overall programming presented views in contrast to those which you state were broadcast on February 19, 1972, no further Commission action appears to be warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73-19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KENNITH A. CASEY, TRADING AS FRANKLIN BROADCASTING CO., RUSSELLVILLE, ALA. Requests 1500 kHz, 1 kW, DA, Day For Construction Permit	File No. BP-18225

MEMORANDUM OPINION AND ORDER

(Adopted January 4, 1973; Released January 10, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration (i) the above-captioned application for a construction permit; (ii) a petition to deny filed by Franklin Broadcasting, Inc., licensee of station WWWR, Russellville, Alabama; and (iii) pleadings in opposition and reply thereto.[1]

2. The petitioner bases its claim of standing as a party in interest on the allegation that the proposed operation would be located within its service area and compete with it for listeners and advertising revenue. The Commission finds that the petitioner has standing as a party in interest within the meaning of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission rules. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 9 RR 2008 (1940).

3. The petitioner contends that the applicant has demonstrated such negligence, carelessness, or disregard of the Commission's processes that it is questionable whether he can be relied upon to fulfill his responsibilities as a licensee. Specifically, it states that the applicant violated the Commission's publication requirements by publishing a local notice of the filing of his application approximately six months after the application was tendered for filing and not within the time provided,[2] by notifying the Commission more than 20 days after the statement was due that he had published the notice,[3] and by failing to have available for public inspection a copy of the application at the location he specified in the notice. In addition, the petitioner argues

[1] The applicant's opposition to the petition to deny was not filed timely in accordance with section 1.45(a) of the Commission rules, but it has been treated and considered on the merits because it contains facts which we think are necessary to enable us to reach a decision in this matter.

[2] Section 1.580(c) of the rules provides that notice shall be published within a three-week period immediately following the tendering for filing of an application, or, if there is no daily newspaper published in the community, within the four-week period immediately following the tendering for filing of the application.

[3] Section 1.580(h) provides that within seven days of the last day of publication of the notice required by 1.580(c), the applicant shall file a statement with the Commission setting forth the dates and specifics of publication.

that Casey failed to reveal, in his power increase application for station WKAC, Athens, Alabama, the extent of his broadcast interests by not reporting that he had pending an application for Russellville. In light of these actions, the petitioner requests an inquiry into the character qualifications of the applicant.

4. In opposition to the petitioner, the applicant submitted an affidavit to the effect that he has never filed with the Commission any statement in which he knowingly made any misrepresentations of fact or omissions or attempts to conceal any fact or mislead the Commission. He attributes the delay in publishing a local notice to the fact that he waited for his attorney to give him the exact wording for the notice and that he received the information in December and had the notice published at that time. He states that the notice itself complied with the statutory requirements, and he asks the Commission, due to the above circumstances, to waive the timeliness provisions of its local notice requirement and to accept his publication as complying with the requirements. With respect to his failing to have a copy available for public inspection, the applicant claims that his attorney failed to carry out his instructions, and that once the applicant became aware of his attorney's inaction, he had a public copy made available.[4] In addition, he argues that despite the untimeliness of the local notice and tardiness in having a copy available for public inspection, a petition to deny was timely filed, thereby demonstrating that the petitioner was not prejudiced by the applicant's failure to comply strictly with the publication requirements. Moreover, Casey claims that there is no allegation that any other person was prejudiced because of the minor deficiencies cited by the petitioner. Finally, the applicant states that he made an honest mistake in failing to state, in the WKAC application to increase power, that he had filed an application for a standard broadcast facility for Russellville, but that the grant of his applications to increase power and renew the license of WKAC shows that he has the requisite character qualifications to be a licensee.

5. In a supplementary pleading, the petitioner claims that the applicant's character qualifications are questioned further by his business relationship with station WMSL, Decatur, Alabama. It contends that Casey, in response to a Commission inquiry in 1963, stated that he would sever his connections with WMSL in the event that his application for a station in Athens, Alabama, were granted. The petitioner argues that the applicant has remained chief engineer of WMSL and has not revealed this interest in his application. It states that a trade publication records that Mr. Casey is the chief engineer of WMSL, that a WMSL receptionist stated that Casey was the chief engineer, and that the applicant in its responsive pleading stated that he was employed at WMSL (AM, TV), Huntsville and Decatur, Alabama.

6. In response, the applicant states that in 1963, he resigned as chief engineer of WMSL(AM), in accordance with his intention expressed earlier in a letter to the Commission, but that he has remained chief engineer of WMSL(TV). He contends that he had been called upon to examine the equipment of WMSL(AM) not more than 10 to 15 times a year, and he did it voluntarily, without contractual

[4] After these episodes, the applicant retained new legal counsel.

109-025—73——3

obligation or remuneration. He claims that the very minor amount of work that he did for WMSL(AM) was in no way inconsistent with his letter to the Commission, and that it did not involve any conflict between the operation of WMSL(AM) and WKAC. In addition, the applicant states that he was not involved with the programming policies or financial management of WMSL(AM), and he submitted an affidavit stating that since the recent change in ownership of WMSL (AM), he has not performed and does not intend to perform any engineering services for the new licensee.

7. The applicant was admittedly late in complying with the publication requirements of our rules, in making a copy of his application available for public inspection, and in notifying the Commission that he had given local public notice. He has long since complied with these various requirements and, in view of his explanation for his initial failures and the fact that apparently no one was prejudiced by the late compliance, we will waive the strict time provisions of the rules, as requested by the applicant.

8. It is evident from the pleadings that the applicant carried out his 1963 commitment to the Commission to resign as chief engineer of WMSL(AM). He did, however, perform occasional engineering services for WMSL(AM) from 1963–1971, but received no compensation for these services and retained no managerial role with the station. Furthermore, there is no indication that the continuing relationship with WMSL involved any conflict of interest with his ownership of WKAC, Athens, Alabama, or violated any Commission policy or rule, and, accordingly, the applicant's performance of services for WMSL(AM) from 1963 to 1971 does not raise a question concerning his qualifications to be a licensee of the Commission.

9. In two separate charges, the petitioner claims that the applicant has been careless in complying with Commission processes and has violated section 1.65 of the rules. It states that the applicant, in 1968, submitted an application to increase power for WKAC but failed to state that he had pending an application for Russellville, and that the applicant, contrary to section 1.65, failed to amend the Russellville proposal to report the filing and subsequent Commission approval of an application for the assignment of WKAC from Kennith A. Casey, tr/as Limestone Broadcasting Company to Limestone Broadcasting Company, Inc. In response, the applicant contends that, in preparing the WKAC power increase application, he made an honest mistake in failing to report the Russellville application; and that he did not violate section 1.65 since the Commission was aware of both the assignment application and the Russellville application because the assignment application contained an exhibit advising the Commission of the pendency of the Russellville application.

10. The applicant's failure to report, in his WKAC power increase application, that he had pending his Russellville application was a violation of section 1.514 of the rules, which requires an applicant to provide all the information called for in a particular application, including other broadcast interests and applications pending before the Commission. However, we will accept the applicant's explanation that he made an honest mistake in failing to disclose his Russellville application and will not question his qualifications on the basis of

this single omission. With respect to the allegations regarding the applicant's WKAC assignment application, it is clear that the requirements of section 1.65 are not met by filing information in an application other than the instant application. In this instance, however, the assignment of WKAC from Casey as an individual to a corporation in which Casey is the 98 percent owner cannot be considered a substantial and significant change in information so as to come within the purview of section 1.65 of the rules. Accordingly, the applicant's failure to disclose the filing of his *pro forma* assignment application is not a violation of the Commission's rules.

11. The petitioner argues also that a financial issue be designated against the applicant because the costs of construction and operation are unreasonably low, and the bank loan has expired by its own terms. It states that the applicant has carelessly prepared and filed a number of balance sheets that raise a question as to the judgment, if not the intentions, of the applicant. It states that the original balance sheet did not categorize current and long-term liabilities; that an amended balance sheet credited the applicant with assets of its existing facility, WKAC, without showing the station's current liabilities; that the balance sheet indicates that the applicant is relying on contingent operating revenues from WKAC, but it does not state the station's operating expenses. In response to the petitioner, the applicant has submitted a number of financial amendments to bolster his initial financial showing. Defects and insufficiencies in the original financial information have been cured. The applicant's data may not have been totally complete and accurate, but no intent to deceive nor evidence of carelessness sufficient to warrant designation for hearing has been shown. A petitioner does not alone possess the right to file supplemental data, responsive and reply pleadings to support his position, and here the applicant, by preparing additional data, has demonstrated his financial ability. An updated balance sheet showing the individual assets, first-year current and long-term liabilities of Casey was submitted, together with a recent bank loan commitment letter, describing in detail the terms of the proposed loan. Examination of the data indicates that $54,075 will be needed to meet first-year construction and operation costs, consisting of equipment lease payments of $5,600, for equipment whose total cost over a period of years will be $17,320; loan payments with interest, $7,175; miscellaneous costs, including land clearance, $1,500; and first-year working capital, $39,800. To meet these requirements, the applicant plans to rely on available cash, $37,500, and a $35,000 bank loan for a total of $72,500. Since the applicant has substantiated his ability to meet his financial obligations, he is financially qualified.

12. Finally, the petitioner contends that the applicant's transmitter site is unsuitable and that he fails to meet the requirements set forth in the *Primer on the Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Specifically, it states that a personal inspection of the transmitter site shows that a building is not available, the land is unsuitable due to the presence of cedar and scrub trees, and the ground is predominately limestone and, therefore, unfit for a ground system. The community surveys, the petitioner asserts, are defective because the people con-

tacted are not identified sufficiently, the suggestions are not listed, and the proposed programs are not related to the suggestions. The applicant, however, subsequently submitted new photographs of the transmitter site which show the area would serve adequately as a site, and he filed additional programming data which comply with Commission criteria. The applicant listed the suggestions received and the names of the more than 100 people contacted and formulated proposed broadcast services responsive to those needs. Petitioner has not pursued its challenge to these aspects of the application, as amended.

13. The failure of the applicant to observe the Commission's procedural requirements is, indeed, disturbing, and has given us occasion to examine the application with uncommon care. The substantive infirmities of the application have been cured by amendment, but there is no way the applicant can, at this point, purge the record of the procedural failures. The applicant's procedural lapses cannot be condoned or ignored, but, in the particular circumstances of this case, they do not raise in our minds a significant question of the applicant's fitness to be a licensee. We passed favorably upon the question of his fitness when, with this record before us, we granted his application for renewal of the license of station WKAC. We must, therefore, weigh the applicant's lapses against the public interest inherent in authorization of a new broadcast service to more than 50,000 persons in an area which only one radio station is now licensed to serve; the scales weigh heavily in favor of a grant. The applicant and the people he proposes to serve have already incurred the penalty of a four-year delay in action on the application because of the applicant's failure to meet deadlines and to place his application in a grantable posture. With the application now in a grantable posture, we cannot find justification for a refusal to grant the application solely on the basis of past procedural failures which, unlike substantive matters, cannot be cured by amendment. There are no unresolved questions of fact; the sole question is whether the applicant's procedural failures were so serious as to raise a substantial question as to his fitness to be a licensee. We have determined, in the exercise of our judgment, that they do not. We find, therefore, that the petitioner has raised no unresolved substantial or material questions of fact; that the applicant is fully qualified to construct, own and operate the proposed new station; and that a grant of the application would serve the public interest, convenience and necessity.

14. Accordingly, IT IS ORDERED, That sections 1.45(a), 1.526, 1.580(c), and 1.580(h) of the Commission's rules ARE WAIVED, the petition to deny filed herein by Franklin Broadcasting, Inc., as supplemented. IS DENIED, and the application of Kennith A. Casey, tr/as Franklin Broadcasting Company, IS GRANTED, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20054

In the Matter of LEON P. GORMAN, JR., RECEIVER ASSIGNOR and DUNEDIN BROADCASTING CO., ASSIGNEE For Assignment of License of Station WCWR-AM, Dunedin, Fla.	BAL-7538

JANUARY 17, 1973.

Mr. ELLIS J. PARKER, III, Esq.,
"Mount Pleasant" RR 2188,
Upper Marlboro, Md.

DEAR MR. PARKER: This refers to the petition to deny filed May 17, 1972 on behalf of James Brown against the application to assign the license for radio Station WCWR-AM, Dunedin, Florida from Leon P. Gorman, Jr., Receiver, to Dunedin Broadcasting Co. (BAL-7538). The subject application was accepted for filing by the Commission on March 16, 1972, and our Rules provide for the filing of petitions to deny within thirty days after the application had been accepted for filing by the Commission. Since Mr. Brown's petition was filed more than 30 days after issuance of the public notice of the acceptance for filing of the WCWR application, we are treating the document as an informal objection to the application. (See Sections 1.580(i) and 1.587 of the Commission's Rules)

Essentially, the petition alleges that your client, James Brown, made an offer to purchase the subject station on February 7, 1972, and that at the request of Leon P. Gorman, Jr., a sum of $10,000 was deposited as escrow "in a Clearwater [Florida] Bank" towards the purchase of WCWR-AM. Thereafter, on February 25, 1972, it is alleged that Mr. Brown's organization learned that Mr. Gorman intended to accept the offer of the present assignee, even though Mr. Brown's offer was larger than that of Dunedin Broadcasting Co. It is further alleged that the control over the sale of WCWR was not exercised by Mr. Gorman as Receiver but by the attorney for the owner of the assets of the station.

Petitioner requests that the Commission recognize him as a party to the assignment and that the present application be voided as a product of unauthorized control of the license by a person other than the licensee, Mr. Gorman. Finally, petitioner states that he made the only bona fide offer to Mr. Gorman which should be accepted by the trustee as directed by the Commission.

In the present case, the Federal District Court, Tampa, Florida, has exercised full control over the appointment of Mr. Leon P. Gorman, Jr. as Receiver and has conducted and approved the sale of the assets associated with WCWR-AM. In this connection, the Court has approved the sale of WCWR-AM to the present assignee, Dunedin Broadcasting Co., subject to our consent. The allegations raised by Mr.

Brown basically concern the negotiations for the sale of WCWR–AM between Mr. Gorman and the assignee. These negotiations and the final contract for sale have been passed upon and approved by the Court.

Section 310(b) of the Communications Act of 1934, as amended, states that in acting on an assignment or transfer of control application,

> . . . the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit of license to a person other than the proposed transferee or assignee.

Thus, under the Act, the Commission must only consider the qualifications of the assignee and can only act on the application that is before it. Since the Court in an exercise of its jurisdiction has approved the sale of WCWR–AM, we are precluded from going behind the Court's decision. Therefore, parties such as petitioner, not related to the application, who have expressed a willingness to purchase a station but whose offers were not accepted by the licensee must seek their remedies in appropriate local, state or federal courts. Therefore, the informal complaint filed by Mr. Brown against the assignment of license for radio Station WCWR–AM, Dunedin, Florida from Leon P. Gorman, Jr., Receiver to Dunedin Broadcasting Company is dismissed.

Having found, based on the information before us, that the assignee is, in all other respects, legally, financially, technically, and otherwise qualified and that a grant of the application will serve the public interest, convenience and necessity, we have this day granted the subject application.

Commissioner Johnson concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72–1004

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GREAT TRAILS BROADCASTING CORP. For Renewal of License for Stations WCOL and WCOL–FM, Columbus, Ohio	File Nos. BR–291 BRH–410

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 15, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration (1) the above-captioned license renewal applications, filed by Great Trails Broadcasting Corporation (licensee); (2) a petition to deny the applications, filed August 31, 1970, by a number of persons individually and as agents for various organizations in Columbus, Ohio; (3) the licensee's opposition to the petition to deny, filed September 9, 1970; (4) petitioner's October 12, 1970, reply to the licensee's opposition; and, (5) a letter, filed October 23, 1970, on behalf of the licensee of Stations WCOL and WCOL–FM.

2. The petitioners describe themselves as individuals and community groups concerned with the protection of the rights and advancement of the interests of Black persons as well as the interests of the entire community. Petitioner Columbus Broadcasting Coalition, is a coalition of these groups working to improve the responsiveness of Columbus broadcasters to the Black community.

3. Petitioners state that the Great Trails Broadcasting Corporation (hereinafter referred to as "Great Trails") has failed to adequately ascertain the needs and interests of the Columbus Black community. They state that Great Trails' use of Welcome Wagon surveys in its ascertainment process is an example of the manner in which Great Trails denies less affluent Black residents a voice because the "Welcome Wagon operates basically in the upper middle income Anglo-Saxon areas." Petitioners further state that Great Trails has not sought the opinions of "the actively progressive Black community," and that Great Trails "does not understand that all Black people are not represented by the Urban League or other such 'civil rights' organizations."

4. Petitioners next state that Great Trails has failed to recognize the cultural needs of the Black community. They state that during negotiations, the management of Station WCOL said that the station wanted all disc jockeys "to have the same sound," and that this requirement that all announcers speak in the "white middle class way"

denies "Black Americans an opportunity to become involved in what might be called the most dynamic of all communications methods which influence the early and mid-teens of this country." Petitioners also state that the news presented on Station WCOL is inadequate and discriminatory. They state that more time is spent "telling 'about' the news" and on advertising than on actual news presentation; that identification by race on newscasts is limited to Black offenders, and that white children are treated with greater warmth and endearment than Black children on newscasts. In conclusion, petitioners state that the foregoing raises substantial and material questions of fact as to whether renewal of license for Stations WCOL and WCOL–FM would serve the public interest and, therefore, assert that a hearing on the renewal applications is required.

5. In its opposition, Great Trails initially states that many of the statements in the petition to deny are broad generalities which are incapable of a response. Nevertheless, with regard to its community survey, Great Trails states that six representatives of Black organizations were interviewed by its personnel. The licensee also states that the Welcome Wagon surveys were only a part of its ascertainment process and that it conducted a mail survey directed to all socio-economic classes of the community in proportion to each classes' presence in the community. Great Trails also states that its community survey revealed problems in the community directly related to the groups petitioners claim to represent, including racial relations, housing, job training, drugs and disease, and mass transportation. Great Trails denies that it has a policy of excluding voices which are not white and middle class. The licensee states that individuals of varying backgrounds, races, and religions are presented by the stations, and that the stations presently employ Black announcers.[1] Further, with regard to its newscasts, Great Trails denies any policy or pattern of identifying by race Black persons "alleged to have committed some offense against the white sociological order" or of treating Black children with less warmth or endearment than white children. The licensee also points out that no examples of such conduct accompanied the allegations in the petition to deny. Affidavits of employees of Station WCOL attesting to the lack of the alleged policies discriminating against Black persons are included in the response. Great Trails also details the public affairs programming which it has presented, including programs discussing the Vietnam war, student opinion on various topics, alcoholism, venereal disease, racial relations, and other topics. Great Trails also submits texts of many public service announcements involving organizations within the Black community which it has presented.

6. In reply, petitioners include an affidavit of Miss Shirley Wiley, one of the six Black persons Great Trails stated in its response was interviewed in the community survey, stating that she was never interviewed "in regard to the ascertainment of community needs and interests." Furthermore, petitioners state that even with Black persons who were interviewed, there was only a "one shot interview," never a continuing dialogue with the station. The petitioners characterize the

[1] One of WCOL's news editors and two of its four disc jockeys are Black.

programs presented by Great Trails dealing with the Viet Nam war, brotherhood, urban problems, racial relations, drugs, etc., as "racial tokenism" inadequate to alleviate the frustration of Blacks and inadequate to dispel long-standing racial prejudices. Petitioners further state that Great Trails discriminates against Blacks in pay, promotion, and employment conditions, stating that during the first one-third of the expiring license period, Great Trails had no Black employees, and even now, it has only eight percent Black employees. Petitioners also state that Great Trails does not seek good public relations in the Black community. As examples, they cite what they consider the hostile attitude of the manager of Station WCOL to Mr. Tony Rocciano, Coordinator of the Columbus Broadcasting Coalition, and failure of the station to give news coverage to activities of the Reverend Johnny Bryant's church, a WCOL advertiser. In conclusion, the petitioners again request that the renewal applications be designated for hearing.

7. In a letter dated October 23, 1970, Great Trails replied to what they considered a new charge raised in petitioners' reply—the issue of whether or not Miss Shirley Wiley was interviewed for the community survey. Attached to the letter was an affidavit of Collis A. Young, the general manager of Stations WCOL and WCOL–FM, stating that the employee who interviewed Miss Wiley is no longer employed by the station, but that a survey form indicates that Miss Wiley was interviewed by the former employee on April 6, 1970.

8. Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), provides for a hearing on an application where specific allegations raise a substantial and material question of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. Petitioners, as the foregoing statement of facts discloses, have raised three separate charges concerning Great Trails' operation of WCOL–AM and WCOL–FM. We note at the outset, however, that the discussion in petitioners' pleadings is only directed at Great Trails' operation of WCOL–AM. We find, therefore, that petitioners' pleadings do not raise any issues regarding Great Trails' operation of WCOL–FM. Accordingly, petitioners' petition to deny, insofar as it relates to WCOL–FM's license renewal application, will be denied on the basis of its pervasive lack of specificity.

9. Similarly, petitioners' pleadings, insofar as they relate to Great Trails' operation of WCOL–AM, are also characterized by general allegations and are devoid of any specific facts. As indicated above, to merit a hearing under Section 309(d), petitioners must go beyond mere generalizations and allege some specific facts sufficient to show that a grant of the application under consideration would be *prima facie* inconsistent with the public interest. Thus, petitioners' petition to deny WCOL–AM's license renewal application also warrants summary denial because of its pervasive lack of specificity.

10. Petitioners charge Great Trails with conducting an inadequate community survey. Examination of Section IV of WCOL's application shows that the applicant compiled a profile or demographic study of its service area. This study included data on such matters as projected county populations for the Columbus market, racial statistics,

age distribution within the area, industry employment, income distribution, characteristics of the labor force, and school and university registration data. The applicant also listed the name, location, and chief executive officer of approximately 300 civic, social and professional organizations. In compiling its general audience survey, Great Trails mailed 550 questionnaires to persons in four socio-economic groups ("upper" (5%), "above average" (15%), "average" (52%), and "below average" (28%).) The number of questionnaires directed to each group was in proportion to that group's representation in the Columbus area. Thus, 28 questionnaires were directed to individuals in the upper socio-economic group, 82 to persons in the above average group, 286 to people in the average bracket, and 154 to individuals in the below average group. The selected citizens were asked their opinions regarding the significant needs and problems of Columbus and how these problems could be dealt with. In addition, Welcome Wagon representatives, in cooperation with WCOL, conducted daily radio surveys throughout the year. Approximately 12,000 people per year were contacted in this fashion. The Welcome Wagon representatives mailed their reports to the station on a daily basis. Finally, management level personnel of Great Trails personally interviewed 103 citizens active in various civic, educational and eleemosynary organizations. Of this number, five or six interviewees (depending on whether Miss Wiley is included) were affiliated with "Negro-oriented groups." In addition to persons connected with Black groups, Great Trails asserted that it consulted a number of Blacks who were active in organizations which were not specifically Negro-oriented.

11. The Commission requires a *bona fide* effort by broadcast licensees to inform themselves of community problems through consultations with a cross-section of community leaders and a random sample survey of members of the general public. Here, the licensee has developed the demographic composition of the area its stations serve, determined the groups representative thereof and interviewed leaders of those groups. The licensee has also conducted a general public survey, has analyzed and evaluated the problems ascertained through these surveys and has proposed programming designed to meet these problems. It is, therefore, concluded that Great Trails has established that it is aware of the problems of the area to be served and that it will program its stations to meet those problems.

12. When a thorough community survey—such as the one presented here—has been conducted, more than general disagreements as to the methodology utilized and the conclusions reached is necessary to form the basis of a *prima facie* case for denial of a license renewal. As we have held in the past, the proposition that a community survey must mirror the exact racial makeup of the community must be rejected. *Universal Communications Corporation*, 29 FCC 2d 1022, 1026 (1971). Rather, we require licensees to interview a broad cross-section of community leaders, including minority group leaders. Great Trails, as disclosed above, has done so in this case. Further, notwithstanding the fact that the purpose of the interview with Miss Wiley may not have been made entirely clear, we do not believe that one deficient interview renders an otherwise valid survey unacceptable. Additionally, the technique utilized by Great Trails of a socio-economic apportionment

or recipients of its general public survey appears to us meritorious, not deficient.

13. Petitioners also charge Great Trails with discriminatory programming practices and with a failure to program for Columbus' black community. Initially, we note that petitioners' allegations that the stations' newscasts were inadequate and discriminatory are conclusory in nature and unsupported by specific examples. Great Trails, on the other hand, states that it has express policies in this area to the contrary and there is nothing to indicate that these policies are not followed. Furthermore, as the foregoing facts reveal, Great Trails, during the license period expiring October 1, 1970, did present programming concerning problems in the Columbus community, including programming relevant to Columbus' minority community.

14. For instance, Great Trails has presented several vignettes concerning problems which it determined to be of local importance during its past license term. By way of example, Great Trails presented vignettes entitled "Legal Tips," featuring material from the Franklin County Legal Aid and Defenders Association, and "Brotherhood," featuring material promoting racial harmony, each of which were presented approximately 50 times per month during seven months in 1969. Similar programs dealing with health and school drop-out problems were also aired. A series on cultural history discussed the careers and contributions of many Black-Americans, *e.g.*, George Washington Carver, W. C. Handy, Ralph Bunche, Louis Armstrong, Ethel Waters, Garrett Morgan, John Hope Franklin, Sidney Poitier, and Whitney Young. WCOL also presented "Ohio State University Forum," a weekly 30-minute program presenting Ohio State University faculty and special guests discussing varied topics of current interest, and "The Place," a 30-minute program featuring 25 Columbus students who discuss such topics as drugs, marriage, military service, human welfare, etc., using music for emphasis. In the current renewal applications, Great Trails states that WCOL will present "Drugs," a program warning listeners about the dangers of narcotics; "Education," a program encouraging students to remain in or return to school, and "Cultural History," a program highlighting the history of various racial groups in Columbus by noting contributions to society by members of those groups. "Ohio State University Forum" and "The Place" will continue to be aired on WCOL.

15. Upon the basis of the above facts, the Commission is of the opinion that adequate reasons have not been advanced to justify designating Great Trails' license renewal applications for hearing on programming issues. As noted in *Chuck Stone* v. *Federal Communications Commission*, D.C. Cir., No. 71–1166, Slip Opinion pp. 18–21 (June 30, 1972):

> **How a broadcast licensee responds to what may be conflicting and competing needs of regional or minority groups remains largely within its discretion. It may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty percent of its broadcast time to meet the need expressed by twenty percent of its viewing public. Until this problem is addressed in a rule-making procedure, the scope of FCC review remains whether or not the licensee has reasonably exercised its discretion.**

As the Court further noted:

> The Commission found, and we agree, that plaintiffs' objections here lack the requisite specificity. They are largely conclusory and in most instances are not tied to specific programming deficiencies. Where they are so tied, they fail to indicate whether non-blacks are accorded different, more positive treatment. For plaintiffs simply to object to the quality of WMAL–TV's programming in general and conclusory terms offers the Commission little assistance in terms of the guidelines which it requires to implement policy changes. Furthermore, such generalized criticisms run the risk of turning the FCC into a censorship board, a goal clearly not in the public interest. Of course, there must exist in this area a delicate balance between the maintenance of a free competitive broadcast system and reasonable restrictions on such freedom in the public interest, in view of the scarcity of airwaves for broadcasting. In the absence of a competing broadcast application situation, where a hearing is required, plaintiffs bear a substantial burden of specificity, a burden they have not met in the case at bar.

16. Petitioners also charge Great Trails with discriminatory hiring practices. In so doing, however, petitioners have merely noted that Great Trails only employs eight percent blacks on its staff. As we stated in *The Evening Star Broadcasting Company* (WMAC–TV), 27 FCC 2d 316 (1971), *affirmed sub nom. Chuck Stone* v. *Federal Communications Commission*, D. C. Cir. Case No. 71–1166, June 30, 1972, rehearing denied September 1, 1972, simply indicating the number of minorities employed by a licensee, without citing specific instances of discrimination or a conscious policy of exclusion, is insufficient grounds to require an evidentiary hearing. Furthermore, while an extremely low rate of minority employment may raise questions requiring appropriate administrative inquiry, as noted by petitioners eight percent of Great Trail's staff is composed of minorities. We are of the opinion that this minority employment profile is within a range of reasonableness when considered in conjunction with the minority population in the Columbus standard metropolitan statistical area, which is 11.6 percent black. 1970 Census, General Population Characteristics, PC (1)–B Series (October 1971). Moreover, striving for a certain "sound" is not equivalent to discrimination against members of some racial groups. As noted above, WCOL presently employs two black announcers. We conclude, therefore, that the pleadings in this case do not establish any substantial and material questions of fact regarding Great Trails' employment practices.

CONCLUSIONS

17. Section 309(d) of the Communications Act provides for the grant of a license renewal application where the Commission finds, after full consideration of all pleadings, that there are no substantial and material questions of fact and that a grant of the application would be consistent with the public interest. Section 309(d) also provides that where a petition to deny is filed it must contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. Where the Commission finds that such a showing has not been made, it may deny the petition. Accordingly, based upon our review of Great Trails' renewal applications and all the pleadings filed in this proceeding, we find that the Columbus Broadcasting Coalition has failed to raise a

substantial and material question of fact which establishes a *prima facie* case for denial of WCOL–AM–FM's licenses. We also find that a grant of Great Trial's license renewal applications for WCOL and WCOL–FM would serve the public interest, convenience and necessity.

18. In reaching our conclusions, we are not unaware of the concern being expressed by the Columbus Broadcasting Coalition and other minority groups about the responsiveness of the broadcast media to their problems. Hence, we note with concern the fact that petitioners herein have filed petitions to deny the license renewal applications of a number of stations located in Columbus, Ohio. We also note with concern that similar petitions have been filed against many other stations in cities other than Columbus. The Commission, of course, cannot waive or ignore the pleading standards set forth in Section 309(d) to accommodate petitioners. Clearly, if members of the public choose to wait until the end of a license term and then petition to deny renewal of license, they must meet the strict requirements of Section 309(d). This does not mean however that members of the public are left without the means to improve local broadcast service. We have found that cooperation at the local level is the best and most effective method of resolving local problems and improving local service. Accordingly, we wish to reaffirm our prior expression of policy approving community-broadcaster discussions throughout the license term. Obviously, while under an obligation to ascertain and program for community problems, no broadcaster can be aware of everyone's needs all the time. Therefore, interested citizens who feel a station's performance is inadequate should so advise the broadcaster to provide him the opportunity to consider their ideas and suggestions. Such discussions will, of course, be more effective if conducted throughout the license term and not only at renewal time. Such was not the case herein.

19. In view of the foregoing, IT IS ORDERED, That the petition to deny filed by the Columbus Broadcasting Coalition IS DENIED.

20. IT IS FURTHERED ORDERED, That the above-captioned license renewal applications for Stations WCOL and WCOL–FM, Columbus, Ohio, filed by Great Trails Broadcasting Corporation, ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

A number of concerned citizens—individually and as agents of various community organizations in Columbus, Ohio—brought a petition to deny the license renewals of stations WCOL (AM & FM). The Black Broadcasting Coalition (BBC) brought a petition to deny the license renewals of stations WBBW (AM & FM) in Youngstown, Ohio. Both petitions charge that the challenged stations have failed adequately to ascertain their community's needs and that they have discriminated against various minority groups in both their programming and employment practices.

If true, these claims would surely indicate that these stations have failed to serve the public interest. *See, e.g., Primer on Ascertainment*

of Community Problems by Broadcast Applicants, 27 FCC 2d 650 (1971); *Radio Station WSNT, Inc.*, 27 FCC 2d 993 (1971); *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 FCC 2d 766 (1968), 18 FCC 2d 240 (1969), 23 FCC 2d 430 (1970). However, by holding that the pleadings of these petitioners have failed to raise "substantial or material questions of fact" sufficient to show that a grant of these renewals would be *prima facie* inconsistent with the public interest, the majority—with a casual wave of its collective hand—simply brushes these objections aside and grants the renewals.

Under the majority's Draconian approach to our vague, yet stringent pleading rules, these petitioners never really had a chance. I dissent.

In *Stone* v. *Federal Communications Commission*, —— F. 2d —— (D.C. Cir. 1972), 24 RR 2d 2105 (1972), the D.C. Circuit held that, under § 309(d)(1) of the Communications Act of 1934, a petition to deny a licensee's renewal application does not mandate an evidentiary hearing unless that petition contains specific allegations of fact sufficient to show that a grant of the application would be *prima facie* in consistent with the public interest. Like the FCC, the Court merely parroted the language of the Act—failing to elucidate on the sort of allegations required.

As a result, the majority today—as it has done repeatedly in the past—leaves in total darkness those citizens who are concerned enough about the state of broadcasting in their communities to challege a station's renewal application. These selfless citizens just keep filing their renewal challenges, and the majority—after some perfunctory analysis—just keeps telling them that their pleadings have failed to meet the requisite specificity.

Absent a clearer definition of precisely what that specificity "test" demands, I would think that—if we are truly interested in ensuring that our licensees are "serving the public interest" (a phrase upon which the majority has also consistently declined to elaborate)—we would at least give these challengers an opportunity to amend their complaints. *See* my dissent in *Letter to George Corey*, ——— FCC 2d ——— (1972). Absent such procedural flexibility, we are confronted with a pure adversary proceeding where the licensee's lawyers are pitted against the challengers—challengers who do not seek either control or ownership of the station, but whose sole desire is that the broadcaster better serve its community's needs. In such a system, the licensee will invariably win; but the public interest can only lose.

In such circumstances, I should think that this Commission—whose goals are, at least in theory, rather congruent with those of these and other challengers—could do better to help serve the public interest by making a greater effort to determine the truth.

For example, the BBC argues that, in ascertaining its community's needs, the Mahoning Valley Broadcasting Corporation, WBBW's licensee, failed to consult with any members of the community's Spanish-speaking minority—a minority which, according to the BBC, constitutes 8% of the population. This allegation is nowhere denied by the licensee. Yet, the majority finds no problems with the licensee's ascertainment study. Must the pleadings be more specific, or is the majority actually holding that a licensee need not consult with its community's minorities in ascertaining community needs? Surely,

the majority cannot be reaching the latter conclusion. So, why doesn't it at least offer the petitioner some indication of the information it seeks?

In the case of WCOL, the petitioners charge the licensee with discriminatory hiring practices, something which our regulations specifically prohibit. See *Nondiscrimination Employment Practices of Broadcast Licensee*, *supra*, and a problem we have sought recently to correct—though in a rather chaotic, half-hearted manner. See my separate statement in the *Pennsylvania-Delaware Renewals*, ——— FCC 2d ——— (1972), and the subsequent *Pennsylvania-Delaware Equal Employment Opportunity Inquiries*, ——— FCC 2d ——— (1972), and also in the *Washington, D.C., Maryland, Virginia, West Virginia Letters of Inquiry*, released this day.

The majority notes that the licensee's staff is 8% black and that this figure is "reasonable" given the fact that the community is 11.6% black. Aside from this totally ad hoc, unsupported declaration, the majority does not even pause to inquire as to the positions held by these minority members, nor does the majority ask whether this 8% figure represents a reduction in the number of black employees at the stations between 1971 and 1972.

In *Pennsylvania-Delaware Renewals*, *supra.*, the FCC agreed that a reduction in black employment during the last two years should arouse our suspicion and should thus warrant further investigation into a licensee's hiring practices. Had the majority so inquired of Great Trails—an inquiry which demands no more than a glance at the licensee's Annual Employment Report, Form 395—the majority would have discovered that while the station employed eight blacks in 1971—in both full and part time positions—the station employed only seven in 1972.

Since the majority is obviously not going to investigate on its own, it should, at the very least, give the petitioners an opportunity to amplify their complaint.

Indeed, the majority has no problems permitting a licensee—who should not need such favored treatment—the right to amplify and to update its filings. In response to petitioners' claim that Great Trails' efforts at ascertaining its community's needs for the coming years were inadequate, the majority suggests that Great Trails could amend its renewal applications pursuant to § 1.522(a) of the rules, 47 CFR § 1.522(a), by conducting a further ascertainment of community problems.

In *Stone* v. *Federal Communications Commission*, *supra*, the Court held that a licensee could, under § 1.522(a), amend its ascertainment study prior to Commission scrutiny in a renewal proceeding. However, the renewal applicant in that case had sought to amend its ascertainment study on its own motion, well before final Commission action on both the application and an opposing petition to deny. The Court held only that new ascertainment efforts, at that stage of the proceedings, did not violate our policy against upgrading, on the theory that ascertainment is prospective in nature.

There is some question—at least in my mind—about whether the *Stone* court would reach the same result where a licensee does not, on its own, find any difficulties with its ascertainment survey, but,

rather, submits that study to the Commission and rests. In short, I am not convinced that just because an applicant is able to amend its ascertainment study *prior to* a Commission decision upon the merits of that survey, an applicant may amend its survey *after* the Commission has ruled it inadequate. For, in the latter case, the licensee's stubborn refusal to consult properly with its community of service should, I would think, merit *some* form of disapprobation.

But, assuming that the majority is correct in its reading of *Stone*, I cannot see why that majority distinguishes so invidiously between a licensee's right to amend its ascertainment study and, hence, its renewal application, and the right of a concerned citizen's group to amplify its pleadings. This sort of unequal treatment reveals, better than I could ever hope to accomplish, the majority's preference for our licensees at the public's expense.

If we are truly concerned about the failure of these petitioners to offer us the required specificity, then we ought to so advise them and then give them at least one opportunity to try again. To do otherwise, especially while, at the same time, giving our licensees a second bite of the ascertainment apple, is not merely inequitable, and not merely contrary to the public interest which we are directed by Congress to protect—it is simply outrageous.

I dissent.

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS, CONCURRING IN PART; DISSENTING IN PART

In Re: Renewal Proceedings in Youngstown and Columbus, Ohio.

I concur with the majority on these cases insofar as its holding that the petitions to deny filed by the respective community groups do not attain—or candidly, even proximately attain—the procedural standard of specificity mandated by the Communications Act.[1] It is a hackneyed, but nonetheless true, legal bromide that bad cases make bad law. Vague invective and wide-brush critique in a legal pleading requiring factual precision provides the (justifiably) ideal juridical basis for dismissal. Interested parties must dig deep, make the effort to pinpoint and factually support the exact abuses of which they complain so as to render summary rejection, with attendant loss of credibility, illegal if not impossible.

My point of departure and dissent from my colleagues stems from the fact that the perceived deficiencies in the petitioners' pleadings eliminates only inadequate petitioners from the renewal byplay—it in no way eliminates the Commission itself. As the principal monitors of broadcaster performance, we have the main statutory duty to investigate licensee activities; especially when confronted with earnest complaints from the neighbors. The Commission frequently acts on

[1] Specifically, 47 U.S.C. § 309(d)(1). It must be conceded that Congress intended a strict standard when amending the statute to permit petitions to deny. Congress expected:

> ". . . a substantially stronger showing of a greater probative value than is necessary now in the case of a post grant protest. The allegations of ultimate, conclusionary facts or mere general affidavits . . . are not sufficient." S. Report No. 690, 86th Cong., 1st Session, p. 3 (1959).

See *Stone* v. *F.C.C.*, Case No. 71-1166 (D.C. Cir. June 30, 1972). But see, *Marine Space Enclosures, Inc.* v. *FMC*, 137 U.S. App. D.C. 9, 18 (Note 22) (1969) where the court observed that "[P]rocedural requirements depend in part on the importance of the issues before the agency."

its own volition in withholding renewals when it suspects delinquencies. It should not stand behind a procedural barrier on the apparent side of a licensee and let the matter ride simply because a complainant is without the assiduity, resources or legal acumen to mount a perfect attack.[2] Rather, the Commission should be on all sides looking critically in; not at the quality of the complainants' performance—we do not license complainants—but at the activities of the station.[3]

Accordingly, while I don't believe the Commission's action here is wholly unwarranted, it certainly could have gone further in fulfilling its own statutory function in these cases.

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[2] That the Commission need not depend solely on the procedural sufficiency of denial petitions in determining the propriety of license renewal is clearly enunciated in 47 U.S.C. § 307. In pertinent parts, that Section provides that the Commission "may officially notice" (§ 307(d)(2)) facts and circumstances and if the Commission is "for any reason unable to make the [public interest, convenience and necessity] finding specified . . . it shall formally designate the application for hearing on the ground or reason then obtaining". It is axiomatic that before the Commission can find "any reason" it must first look.

[3] For an astringent reminder of the Commission's appropriate role in these renewal triangles, see Judge Burger's opinion in *Office of Communications of the United Church of Christ* v. *F.C.C.*, 138 U.S. App. D.C. 11, 425 F. 2d 543 (1969).

109-025—73——4

F.C.C. 73–50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re LIBERTY COMMUNICATIONS, INC., BESSEMER, ALA. For Certificate of Compliance	CAC–605 ALO83

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. On June 9, 1972, Liberty Communications, Inc., filed an application (CAC–605) for certificate of compliance for a new cable television system at Bessemer, Alabama. Bessemer, a community of 33,231 persons is located within a major market, Birmingham, Alabama (#40). Liberty proposes to carry the following television broadcast signals WAPI–TV (NBC), WBMG (CBS), WBRC–TV (ABC), WBIQ (Educ.), all Birmingham, Alabama; WCFT (CBS), Tuscaloosa, Alabama; WTCG–TV (Ind.), Atlanta, Georgia, KPLR–TV (Ind.), St. Louis, Missouri; and WRIP–TV (Ind.), Chattanooga, Tennessee. Liberty's application is opposed by Taft Broadcasting Company, licensee of Station WBRC–TV, Birmingham, Alabama.

2. Taft argues that Liberty's franchise does not comply with the requirements of Section 76.31 of the Commission's Rules; specifically: that the franchise is for a duration of twenty, rather than fifteen years; that there is no provision for significant construction to be accomplished within one year after receipt of Commission certification; that there is no provision for extension of energized trunk cable to a substantial percentage of the franchise area each subsequent year; that there is no provision for service complaints; and that there is no provision for maintenance of a local business office in Bessemer.

3. In response to Taft's objection, Liberty amended its application as follows: it states that its franchise was granted January 25, 1972, and substantially complies with Section 76.31 of the Rules; it commits itself to accomplish significant construction within one year of receiving Commission certification and thereafter to equitably and reasonably extend energized trunk cable to a substantial percentage of its franchise area each year; it submits regulations specifying procedures for investigation and resolution of all service complaints which will be submitted for the approval the City of Bessemer; and it states that it presently maintains a business office in Jefferson County, Alabama, within 15 minutes ride of Bessemer, and expects to have one or more agents who reside in or near Bessemer. We find there is substantial compliance sufficient to permit grant of the application until March 31,

1977, *CATV of Rockford, Inc.*, FCC 72–1005, ——— FCC 2d ———; *LVO Cable of Shreveport-Bossier City*, FCC 72–954, ——— FCC 2d ———.

In view of the foregoing, the Commission finds that grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Application for Certificate of Compliance" filed by Taft Broadcasting Company, on July 28, 1972, directed against CAC–605, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–605) for certificate of compliance IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1001

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MAHONING VALLEY BROADCASTING CORP. For Renewal of Licenses for STATION WBBW, YOUNGSTOWN, OHIO	File No. BR-2247
and STATION WBBW-FM*, YOUNGSTOWN, OHIO	File No. BRH-935

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 15, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (1) the above-captioned license renewal application filed on July 6, 1970, by Mahoning Valley Broadcasting Corporation (WBBW); (2) a petition to deny each of the above-captioned applications, filed October 1, 1970, by the Black Broadcasting Coalition and others (hereinafter BBC);[1] (3) WBBW's opposition to the petitions to deny, filed October 14, 1970; and, (4) BBC's reply filed November 4, 1970.[2]

2. WBBW raises a question concerning the standing of the petitioners in this case. The BBC is an "umbrella" organization whose members include various community organizations in the Youngstown area. We believe the standing of the BBC is clear. *Office of Communications of the United Church of Christ, et al.* v. *F.C.C.*, 123 App. D.C. 328, 359 F. 2d 944 (1966).

ASCERTAINMENT

3. BBC criticizes WBBW's ascertainment of community problems on several grounds. It is alleged that a single ascertainment study was conducted for both WBBW and WBBW-FM. BBC also alleges that WBBW failed "to include any description of the stations' service area or the major groups and interests of which it is comprised," and that "no information is provided concerning the sampling technique employed or the selection of the leadership or general public samples." Further, according to BBC, the 46 interviews with community leaders and 42 interviews with members of the general public are numerically

[1] On August 27, 1970, the Commission granted BBC a 30-day extension of time in which to file petitions to deny WBBW's renewal applications.

[2] On October 29, 1970, BBC's request for a more than one month extension of time in which to file its reply was denied. However, the filing date was extended until November 4, 1970.

*Subsequent to the filing of pleadings in this proceeding, the call letters of WBBW-FM have been changed to WQOD(FM), effective May 1, 1972.

insufficient. Although BBC acknowledges that WBBW ". . . made a special effort to consult with representatives of the Black community . . .", it is alleged that ". . . the station's overall lack of concern for minority groups remains, as indicated by its total failure to consult with members of other minority groups, such as the Spanish speaking community." BBC also alleges that WBBW has not provided a detailed discussion of community needs and interests, nor has there been an attempt to differentiate between the problems of minority and majority communities. BBC charges that WBBW's inclusion of a listing of Black interest items carried on "Open Mike" shows indicates the station's "superficial preoccupation with the Black community". Finally, BBC states that WBBW's "nebulous description of a contemporary music format . . . provides little or no insight into the station's understanding of the Youngstown Community."

4. In opposition, WBBW first states that BBC was incorrect in stating that WBBW had conducted a single ascertainment survey. On the contrary, licensee submits that it is continuously ascertaining the area's problems ". . . through its Community Service Director, Mr. Mizell 'Chick' Stewart, Sr., by its continuing contacts with prominent community leaders and groups as they utilize the public service facilities of the Station, by its public affairs programs and news programs, by written contacts urging the use of the Station's facilities, and by continuing contact with the leaders of the various educational, governmental and civic organizations." WBBW also states that it conducted 104 interviews with members of the general public. In this connection, WBBW points out that the 42 individuals listed in its renewal exhibit were clearly identified as "A representative list of area residents with whom dialogued surveys were conducted." This is all that is required, according to licensee, since the Commission does not require an applicant to submit a list of all contacts made. In opposition to BBC's allegation that the station's ascertainment showing contained no description of the station's service area or the groups and interests of which it is comprised, WBBW points to its list of civic organizations, interests and groups consulted in the survey. Licensee also includes as an exhibit in its opposition several tables of population statistics. Regarding the allegation that it has shown lack of concern for minority groups, WBBW contends that it consulted with a cross section of the community and that the national origin of persons contacted was not requested. The licensee also states, contrary to BBC's allegation, that its renewal application does provide a detailed discussion of community problems. In this connection, WBBW points to Exhibits 3, 4, and 5, of its renewal applications, which list the various individuals, groups, and organizations in the community which were consulted, the problems ascertained, and some of the types of programs proposed.

5. In defending its inclusion of the list of 28 programs on "Open Mike" which were of interest to the Black community, WBBW states that they were ". . . merely representative programs where the guests were all Black." Further, WBBW states that it has used the "Open Mike" show to meet many of the current needs and interests of the total community, including the Black community. Some of the topics included were problems of the city, drugs, city transportation, war in

Vietnam, city health problems, community sewer tax issues, mental health, welfare, parks and recreation, and many others. In addition, licensee states that "To Be Equal", a local weekly program series produced in cooperation with the local Urban League, is specifically designed for the Black community. This program began in March 1970 and is aired each Saturday at 6:15 p.m. on WBBW–AM and FM. The licensee also states that it carries a series entitled "Did You Know", which is dedicated to highlighting Black history. This series, according to licensee, appears 30 times each week on both WBBW–AM and FM. Another program which WBBW states is meeting community needs is "Job Call", a weekly 15-minute program presenting job availabilities within the Youngstown market. "Opportunity Line" and "Life Line" are two other shows which, WBBW contends, serve the needs of the Youngstown area. Finally, in opposition to BBC's allegation that its application contained a "one-page nebulous description of a contemporary music format", WBBW alleges that no such description exists in its application since it does not have a contemporary music format.

6. In reply, BBC states that it has alleged not a total lack of consultation with the Black community, but an inadequate consultation and responsiveness and an overall insensitivity to the problems and needs of the Black community. BBC also challenges several of the consultations listed in WBBW's application by submitting statements of the directors of three organizations who state that the individuals consulted by WBBW were not authorized to represent their respective organizations. BBC also includes the statements of two other individuals who were consulted by WBBW. These individuals state, in essence, that the interviews were ineffectual. Petitioner states that its conclusion that WBBW conducted a single ascertainment study for WBBW–AM and WBBW–FM was based on the fact that the two renewal applications contained "identical" supporting documents, and by the fact that the licensee submitted a single opposition and motion to dismiss for both stations. The licensee's ascertainment, according to BBC, does not meet the standards of the Commission's 1968 Public Notice on *Ascertainment of Community Needs by Broadcast Applicants*, 13 RR 2d 1903.[3] BBC next alleges, in its reply, that WBBW's Community Service Director, Mr. Mizell Stewart, was hired without BBC's being consulted regarding his qualifications. Mr. Stewart, it is alleged, is unqualified for the position since he works fulltime for the Youngstown Police Department. It is further alleged by BBC that Mr. Stewart is an older man who is not attuned to the attitudes of younger people in the community. Regarding WBBW's claim that it actually contacted at least 104 members of the general public, BBC acknowledges that the applicant is not required to submit supporting data. However, petitioner asserts, "Certainly, when a Petition to Deny has been filed, the licensee ought to find it in his best interest to indicate exactly what ascertainment efforts were taken." It is next alleged in BBC's reply that only 18 of the 42 residents were from the Youngstown area and only two of that number were Black. Petitioner submits statements from these two individuals which state

[3] These requirements were subsequently set out in the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971).

that they were not personally consulted by WBBW. BBC also asserts that WBBW has ignored the Spanish-speaking population of Youngstown. In this connection, it is alleged that this group includes 8 percent of the population of Youngstown, that it is a substantial as well as cohesive segment of the population, and that its members are readily identifiable by surname.

7. In its reply, BBC further contends that WBBW's use of call-in programs is "a cheap and easy format." Petitioner also charges that WBBW failed to submit any evidence in support of its claim that it carried more than 28 programs of service to the Black community. Regarding WBBW's establishment of the program "To Be Equal", BBC alleges that it is merely "a token gesture", although "[i]t is a start in the right direction . . ." BBC also contends that the institution of the vignettes "Did You Know" was a good start, but it is no way representative of WBBW's past or proposed programming and can barely begin to compensate for its past and proposed inadequacies. In this connection, BBC alleges that the licensee's other programs, "Job Call", "Opportunity Line", and "Life Line", are designed for the community as a whole and not for the Black community in particular. Petitioner contends that WBBW does not distinguish between its AM and FM facilities, yet such treatment is somewhat misleading. Thus, BBC notes that "WBBW–FM is increasingly a 'background music' station and WBBW–AM is wedded to a call-in format for public affairs programming."

PROPOSED PROGRAMMING

8. With respect to WBBW–AM's proposed programming, BBC first alleges that the station proposes to reduce the time devoted to programs in the categories of news, public affairs, and "other". Thus, BBC states that news will be reduced from 11.1% to 10.4%; public affairs will be reduced from 9.4% to 6.7%; and "other" programming will be reduced from 7.9% to 3.7%. Petitioner next alleges that the WBBW–AM application lists three weekly programs related to Blacks which it intends to continue in the next license period. BBC claims that all three of those programs, "Job Call", "To Be Equal", and "Bethel Church of God in Christ", were begun within the past six months as a result of its efforts. It is alleged further that "[t]hese minimal station gestures are neither sufficiently responsive to the needs and interests of the Black community to be acceptable nor are they in any way indicative of WBBW's programming record over the past license period." Petitioner contends that WBBW's call-in shows, which it describes as the chief means of discussing public issues, are not sufficient to resolve public questions. With respect to WBBW–FM's proposed programming, BBC alleges that 85% of the time will be devoted to recorded music, while only 5.3% will be devoted to news, 0.8% to public affairs, and 1.9% to "other" programming. Since petitioner presumes that most of WBBW–FM's nonentertainment programing will be duplicated from WBBW–AM, it is alleged that ". . . the station . . . will not add to the community's diversity of informational, instructional or religious programs."

9. In opposition, the licensee maintains that its proposed reductions in the program categories of News, Public Affairs, and All Other programming, Exclusive of Entertainment and Sports, are insignificant. The licensee also states that the amount of programming proposed in these categories is sufficient to meet the problems in the Youngstown area. The licensee states further that, although it has proposed reductions in the amount of broadcast time it proposes to devote to these programming categories, WBBW is nevertheless broadcasting the same amount of News, Public Affairs, and All Other programming presently being broadcast. It is the licensee's position that its AM renewal Exhibit 5, which lists 33 programs or program series to be broadcast, meets the needs and interests of the area. In this connection, WBBW characterizes its 12 hours of public affairs programs a week on its AM facility as exemplary in comparison with the average radio station. WBBW alleges that BBC erred in its conclusion that the three programs for the Black community were initiated by the station as a result of the efforts of the petitioner. Rather, the license contends, all three programs were begun prior to any dialogue with the petitioner: "Job Call" on May 18, 1968: "To Be Equal" on March 21, 1970; and "Bethel Church of God in Christ" on July 21, 1963. Finally, WBBW disagrees with petitioner's conclusion that its audience participation programs, "Open Mike" and "Life Line," do not contribute to the resolution of public questions in the Black community or within the Youngstown community as a whole. Such a conclusion, according to WBBW, ". . . is self-serving and contrary to the Commission's pronouncements that these types of public affairs programs are wanted and needed to fulfill the public's desire to discuss current problems of any area."

10. Petitioner, in reply, contends that the licensee has given no indication of the nature of its contemplated format change or its effect on the station's service to the community. BBC also alleges that call-in shows are informal, unstructured, often lightweight and not exemplary programming.

PAST PROGRAMMING

11. With respect to WBBW's past programming, BBC alleges that licensee's list of past programs which it intends to continue in the future greatly exceeds its list of typical and illustrative programs presented during the past year. The only program which offered any potential for local participation by minority groups, according to BBC, was "Open Mike". Petitioner further alleges that no regular series are listed in the areas of public affairs, instructional or religious which relate specifically to Blacks or other minorities.

12. WBBW, in opposition, submits that BBC's allegations regarding its past programs are in error and not factual. WBBW states that Exhibit 5 is a list of typical programs and program series which the station presently broadcasts and plans to continue while Exhibit 7 is a partial listing of programs carried. The following programs listed in Exhibit 5, licensee asserts, specifically relate to all minorities in the Youngstown area: "Open Mike", "Education News Special", "Consumer Time", "Watch Your Step", "Your Social Security", "The Veteran's Show", "Concert Preview", "Northwestern Reviewing

Stand", "Valley Tales", "Job Call", "Georgetown Forum", "Life Line", "To Be Equal", "Party Line", Business Review", "Mt. Calvary Pentecostal Church" and "Bethel Church of God in Christ".

13. In reply, BBC states that WBBW has failed to demonstrate the alleged error in petitioner's analysis of its past programming. Petitioner further states that the licensee has not supplemented its "partial listing" in Exhibit 7. Finally, BBC characterizes as absurd WBBW's statement that all of the public affairs, instructional and religious programs listed in Exhibit 5 specifically relate to minorities in the Youngstown area. In this connection BBC questions, *inter alia*, whether "Bethel Church of God in Christ" relates to the minority Jewish or Lebanese communities, or whether "The Veteran's Show" relates to the female minority.

COMMERICAL PRACTICES

14. BBC next alleges that the station exceeded the 18 minute per hour commercial limit set by the NAB Code on two occasions in the composite week. Licensee states that it exceeded its policy of limiting commercial matter to 18 minutes on two occasions. In one hour it exceeded its limit by 30 seconds and in the other hour by 20 seconds. It is licensee's contention that these two instances do not violate the station's policy or the Commission's.

PUBLIC FILE

15. Petitioner alleges that on September 29, 1970, Mrs. Margaret Linton visited WBBW's studios to inspect the station's policy relating to minorities. However, according to Mrs. Linton's statement, the station personnel were unable to produce the document. Petitioner alleges that this is a clear violation of Section 1.580 of the Commission's rules.[4] The licensee denies violation of the Commission's rule. It contends that Mrs. Linton requested the public file from a female staff member whose responsibility does not include knowledge of the location of the public file. All other staff members were out to lunch, according to licensee. WBBW further contends that if Mrs. Linton had returned after lunch the public file would have been made available to her as it had been on another occasion. In reply, BBC contends that the Commission's rule requiring the availability of a public file does not contain an exclusion for lunch hour.

NEGOTIATIONS

16. BBC contends that WBBW has been totally inconsiderate in responding to its efforts to make broadcasting relevant to the needs of Black people and other minorities. In particular, BBC alleges that it submitted three specific proposals to the station and on each occasion the licensee's response showed no genuine interest in seeking solutions to the many community problems. The licensee, in opposition, states that it has responded to each proposal presented to it by BBC and that it will continue its dialogue with petitioner and other representa-

[4] Petitioner erroneously cites Section 1.580. The rule involved is Section 1.526.

tives of the community. Further, WBBW submits that it does have a genuine interest in seeking solutions to the apparent problems of the Black community.

EMPLOYMENT

17. Finally, BBC alleges that WBBW employs only four Blacks out of a total of 32 persons. Of these four, one is a fulltime custodian, one a part-time community service director and one a part-time clerk-typist. It is alleged that this record of employment is not in accord with the Commission's rules concerning equal employment opportunities. BBC further alleges that it does not appear that WBBW has any affirmative plans to conform with the Commission's rules. The licensee disagrees with petitioner's conclusion and asserts that it is an equal employment opportunity employer. To demonstrate its compliance with the federal and local laws governing employment, WBBW submits a copy of the station's employment application. BBC states in reply that submission of this application is merely an empty gesture if the station continues to employ only token Blacks in non-policy making positions.

CONCLUSIONS

18. Petitioner has alleged that the licensee's past programming has not been in the public interest. As we stated in the *1960 Network Programming Inquiry, 25 F.R. 7291:*

> . . . the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his community or service area, for broadcast service.

The Commission has never imposed upon licensees any requirement that they broadcast certain types of programs in order to fulfill their public interest obligation. Programming is generally a matter left to the discretion of the individual licensee. It is not the Commission's function to sit as a final arbiter to evaluate the propriety of a licensee's programming decisions. Rather, it is our duty to determine whether or not the licensee has made a reasonable effort to deal with the problems of his service area.

19. The renewal application for WBBW–AM indicates that during the composite week the station broadcast 14 hours and 57 minutes of news (11.1% of total time on the air), of which the licensee estimates that 33% of this time is regularly devoted to local and regional news. WBBW–AM also broadcast 12 hours and 43 minutes (9.4% of total broadcast time) in the category of public affairs, and 10 hours and 36 minutes (7.9% of total broadcast time) in the category of all other programming, exclusive of entertainment and sports. In addition, the station also broadcast 211 public service announcements.

20. One of the major programs relied upon by licensee to fulfill its public service obligation is "Open Mike". During the past license period "Open Mike" has served as a forum for a diverse range of community organizations and groups. Broadcast each weekday morning for two hours, "Open Mike", through a varied format of group discussions, interviews, and call-in participation by listeners, has covered such topics as sewer taxes, drugs, civil defense, city health, water serv-

ice, summer jobs for youth, Vietnam, and transportation. "Open Mike" has also featured interviews and discussions with leaders of the Youngstown Black community. These leaders have discussed such issues as the welfare family, rehabilitating homes for the inner city and civil rights. Other programs which were broadcast to meet community needs include: "To Be Equal", a 15-minute program broadcast each Saturday and produced in cooperation with the Urban League; "Did You Know", 40 to 90-second vignettes about Black history broadcast 30 times each week; "Job Call", a 15-minute program broadcast each Saturday presenting local job opportunities; "Life Line", a call-in show produced in cooperation with the Youngstown Council of Churches; and "Education News Special", broadcast weekdays and produced by the Ohio Education Association.

21. On the basis of the information submitted in licensee's renewal application and its opposition pleading, summarized above, we conclude that WBBW–AM's past programming has been in the public interest. Petitioner's arguments concerning WBBW's past service is merely conclusory. BBC's statement that "No regular series are listed in the areas of public affairs, instructional or religious which relate specifically to Black or other minorities", misconstrues the Commission's requirement that a station serve the needs and interests of its community. Where it appears that a station has followed a discriminatory policy in its over-all programming by failing to serve a substantial minority in the community, a substantial and material question of fact is raised concerning the licensee's service in the public interest. *Radio Station WSNT, Inc.*, 27 FCC 2d 993 (1971). Here, however, there is no such evidence of discriminatory programming; nor is there any evidence that non-Blacks have been accorded different, more positive treatment. *Stone* v. *F.C.C.*, D.C. Cir. Case No. 71–1166 (June 30, 1972). A licensee has wide discretion in deciding the best manner in which to effectively respond to community problems. Therefore, a program series which discusses numerous community problems, including those of interest to the Black community, should not be dismissed for failure to serve the Black community merely because it is not directed specifically to Blacks. *Capitol Broadcasting Co.*, 28 FCC 1135 (1965). *The Evening Star Broadcasting Company*, 27 FCC 2d 316 (1971), affirmed *sub nom. Stone* v. *F.C.C.*, *supra.*

22. BBC does not make any specific allegations regarding WBBW–FM's past performance. Instead, BBC merely states that the station proposes to continue its good music format. The BBC alleges that this proposal is insufficient to meet the needs and interests of the Youngstown community. This allegation, without more, is too general in nature to require exploration in an evidentiary hearing. Further, most radio stations follow a specialized format; e.g., top-40, soul, all-news, classical, country-western, etc. However, the ultimate test of public service responsibility is not the particular entertainment format utilized but, rather, whether the station is providing informational programming—news, public affairs, and all other programming, exclusive of entertainment and sports— to serve the needs and interests of the public it is licensed to serve. Such programming may, of course, be tailored to the particular format of the station. See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC

2d 650 (1971). In the present case, WBBW–FM broadcast "good music in stereo" 85 per cent of its total air time. Also, as disclosed by its composite week figures, WBBW–FM broadcast 5 per cent news, 0.7 per cent public affairs, and 2.9 per cent all other programming, exclusive of entertainment and sports. Additionally, the station broadcast 128 public service announcements. There is no information before us which indicates that this programming has failed to serve the needs and interests of the Youngstown community; and, accordingly, it is concluded that WBBW–FM's past programming service has been in the public interest.

23. Petitioner alleges that the licensee's ascertainment of community problems is deficient. Our review of WBBW's ascertainment efforts, however, leads us to conclude that those efforts are in compliance with our requirements. The showing required of an applicant in response to Part I, Section IV–A of the renewal application (Ascertainment) is set forth in the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, *supra*. A broadcast applicant is required to conduct personal consultations with community leaders representing a cross-section of the community and to survey the general public in order to determine the problems, needs and interests of the community. After ascertaining community problems, the applicant must then evaluate them to determine their relative importance so that he may propose programming reasonably designed to meet those problems, needs and interests. The number of persons consulted is not the most important factor in judging whether a licensee has conducted a good survey, because the number of such consultations often depends on the size of the station's staff. *Universal Communications Corp.*, 27 FCC 2d 1022 (1971). Rather, what is required is that the licensee make reasonable and good faith efforts to consult with a representative cross-section of the community.

24. WBBW's renewal applications indicate that consultations were conducted with 46 community leaders representing a wide cross-section of community interests. Included among those interviewed were representatives of the following organizations: NAACP, Neighborhood Youth Corps, Chamber of Commerce, Civil Defense Office, County Sheriff, Planned Parenthood Association, Alcoholic Clinic, United Appeal, and others. The licensee also contacted at least 42 members of the general public. Although petitioner has alleged that WBBW's survey ignored minority groups other than Blacks, it has submitted no factual data to support its claim. The one affidavit and five statements appended to BBC's reply do not detract from the validity of WBBW's consultations. These statements allege either that the individuals interviewed were confused as to the purpose of the interview or that they were not asked their opinions about WBBW's operation. In this connection, we emphasize that the purpose of these consultations is to ascertain community problems. Thus, questions pertaining to the station's programming policies or employment practices are not directly relevant to the purpose of the consultations. See *Primer* Question and Answer 18, 27 FCC 2d at 684, 685. Moreover, there is no requirement that an applicant must consult with the head of an organization. To be a community leader, one does not have to hold a position such as director, president, or chairman. We also note that

there is no requirement that a licensee conduct a separate ascertainment for each of its stations in the same city. Such a requirement would amount to an unnecessary duplication of effort, a result which we have attempted to avoid. See *Primer*, *supra*, paragraph 15.

25. As a result of its consultations with community leaders and members of the general public, WBBW compiled a list of 25 problems including, among others, the following: problems and dangers of pollution; the need for higher quality education and better schools; more adequate law enforcement; stronger controls for the drug and narcotics problems; more effective methods for the prevention of crime; more adequate and reasonably priced housing; better understanding between blacks and whites; a better transportation system; more jobs and employment for youth of the community; and solution for taxation problems. To meet these ascertained needs, WBBW proposes to continue the same programs it broadcast in the past license period as discussed at paragraph 18, *supra*. We believe that a promise to continue to carry such programs as "Open Mike", "To Be Equal", "Did You Know", "Job Call", and "Education News Special" which have dealt with a wide variety of community problems, constitutes a sufficient programming proposal to meet community problems in the new license period. As in the past license period, these program proposals relate only to WBBW–AM. We also conclude for the same reasons set forth in paragraph 22, *supra*, that the proposed service for WBBW–FM is adequate to meet the needs and interests of the community.

26. Petitioner's allegation that WBBW–AM proposes to reduce broadcast matter in the categories of news, public affairs, and "other" fails to raise a substantial and material question of fact which requires exploration in a hearing. The Commission has not adopted quantitative standards by which to judge a licensee's performance in the context of a regular renewal. Instead, the amount of such programming has been left to the sound discretion of the licensee based upon his ascertainment of community problems, the format of his station, the size of his market, the availability of other broadcast outlets in the markets and other factors which may affect the licensee's operation of his station. Absent evidence that the licensee's percentage proposals will not meet ascertained community problems or that the licensee has abused its discretion, the Commission will not seek to second guess the licensee. No such evidence has been presented here. In view of the number of variables involved in the operation of a broadcast station, a licensee's program proposals are not expected to remain static. What is important is that a licensee live up to its programming promises. No question of promise versus performance has been raised in this proceeding. In fact, WBBW–AM's programming during the 1970 composite week in the categories of news, public affairs and "other" exceeded its 1967 proposals. Finally, we note that although WBBW–AM's 1970 percentage proposals are less than its 1967 proposals, the licensee states, in its opposition, that it is presently carrying the same amount of programming in the categories of news, public affairs and "other" as the station carried during the past license period.

27. Petitioner has alleged that the licensee's employment record is not in compliance with the Commission's Equal Employment Oppor-

tunity Rules and that the licensee has no affirmative plans to establish compliance. We note, by way of background, that on June 4, 1969, the Commission adopted rules to prohibit discrimination in the employment practices of broadcast licenses. *Nondiscrimination in Broadcast Employment*, Docket No. 18244, FCC 69–631, 18 FCC 2d 240 (1969). At the same time we issued a *Further Notice of Proposed Rule-Making*, 34 F.R. 9288, requesting comments with regard to a proposed annual reporting requirement and a proposed requirement for the preparation of equal employment opportunity programs to be furnished by existing stations in the applications for construction permits, assignments or transfers of control, and renewals of licenses. By *Report and Order* adopted May 20, 1970, released June 3, 1970, 23 FCC 2d 430, we adopted a rule, 47 C.F.R. 1.612, requiring broadcast permittees and licensees to file an annual statistical report on their employment makeup (FCC Form 395), and a requirement that broadcast applicants and licensees submit an equal employment opportunity program (Section VI of FCC Forms 301, 303, 309, 311, 315, 340, and 342). By *Public Notice* dated October 22, 1970, the Commission advised all broadcast licensees and permittees that they would be required to file their initial annual statistical reports of their employment makeup on or before May 1, 1971. The Commission also advised broadcast applicants and licensees who would be filing applications on or after January 4, 1971, that they would be required to file an equal employment opportunity program in accordance with the guidelines delineated in Section VI of the various broadcast application forms.

28. Petitioner's allegations concerning WBBW's employment policies and practices are based solely upon information and belief. Petitioner cites the number of minority persons employed by WBBW and concludes that the licensee has engaged in employment discrimination on the basis of race. No evidence of specific instances of discrimination indicating a pattern of discrimination has been submitted. Nor has petitioner submitted any evidence indicating that the licensee's employment policies contain artificial barriers to employment. While it is recognized that an extremely low rate of minority employment may raise appropriate questions requiring administrative inquiry, the facts in this proceeding indicate that the licensee is making reasonable and good faith efforts to assure nondiscriminatory employment policies and practices and, in particular, to improve the employment status of minorities. An examination of the stations' annual employment reports (FCC Form 395), which are now on file with the Commission, indicates that the licensee is taking affirmative steps to improve its minority hiring. The May 1971 report indicates that WBBW employed 21 persons full time, including one minority service worker. The stations also employed 11 persons part-time, including two minority professionals and one minority office and clerical worker. The stations' 1972 report indicates that WBBW employed 23 persons full time, including one minority professional, one minority office and clerical worker and one minority service worker. The 1972 report also states that WBBW employed six persons part-time, including two minority professionals. These facts also disclose that the percentage of minorities employed by the licensee (i.e., 13%) fall

within a range of reasonableness when compared with the percentage of minorities (approximately 9 per cent) in the Youngstown-Warren standard metropolitan statistical area.[5] On the basis of the information available to us, we conclude that the licensee is making a reasonable effort to maintain policies and practices which assure nondiscrimination in employment.

29. We find petitioner's allegation concerning licensee's commercial practices to be without merit. Although the licensee did exceed its self-imposed commercial ceiling of 18 minues on two occasions, this does not constitute a pattern of over-commercialization.

30. Petitioner alleges and licensee admits that on one occasion the station's public file was not available for inspection by a representative of petitioner. Licensee's explanation that all the employees who were responsible for the public file were out to lunch is not a satisfactory reason for failure to make the file available. Section 1.526 of the rules provides that a file be available at the main studio of a broadcast station during regular business hours for inspection by the public. It is the licensee's responsibility to make any necessary arrangements to have the public file available at all times during its regular business hours. We note, however, that licensee did make its public file available to petitioner on at least one other occasion and the violation of Section 1.526 does not appear to be repeated. We believe that no further action is necessary on this matter.

31. The pleadings indicate the parties have drawn different inferences and conclusions from the facts presented and, to some degree, have become involved in irreconcilable disputes as to the facts themselves. The existence of factual disputes does not give rise in every instance to the requirement that a hearing be held. This requirement does not arise under Section 309(d) of the Act unless the Commission finds that it involves substantial or material questions of fact which have direct bearing on the determination of whether or not the public interest would be served by a grant of the application. *Stone* v. *F.C.C.*, *supra*. Based on our review of the licensee's renewal applications and the matters discussed herein, we find that BBC has failed to raise substantial and material questions of fact which establish a *prima facie* case for denial of WBBW's licenses. We also find that a grant of Mahoning Valley Broadcasting Corporation's applications would serve the public interest, convenience and necessity.

32. In reaching our conclusions, we are not unaware of the concern being expressed by minority groups about the responsiveness of the broadcast media to their local problems. The Commission, of course, cannot waive or ignore the pleading standards set forth in Section

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[5] Bureau of the Census, Advance Report on Population Characteristics PC (V2)–37, February 1971, discloses the following population characteristics for Youngstown and the Youngstown-Warren Metropolitan Area:

Youngstown, Ohio:	
Total population	139,788
White population	103,765
Negro population	35,285
Other	738
Youngstown-Warren metropolitan area:	
Total population	536,003
White population	483,796
Negro population	50,621
Other	1,586

309(d) of the Act to accommodate petitioners. Clearly, if members of the public choose to wait until the end of a license term and then petition to deny renewal of license, they must meet the strict requirements of Section 309(d). This does not mean however that community groups are left without the means to improve local broadcast service. We have found that cooperation at the local level is the best and most effective method of resolving local problems and improving local service. Accordingly, we wish to reaffirm our prior expression of policy approving community-broadcaster discussions *throughout the license term.* Obviously, while under an obligation to ascertain and program for community problems, no broadcaster can be aware of everyone's needs all the time. Therefore, interested members of the public who feel a station's performance is inadequate should so advise the broadcaster to give him the opportunity to consider their ideas and suggestions. Such discussions will be more effective if conducted throughout the license term and not only at renewal time.

33. Accordingly, IT IS ORDERED, That the petitions to deny filed by the Black Broadcasting Coalition and others are denied.

34. IT IS FURTHER ORDERED, That the above-captioned applications for renewal of licenses of Stations WBBW and WQOD (formerly WBBW-FM), Youngstown, Ohio, are hereby granted.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

A number of concerned citizens—individually and as agents of various community organizations in Columbus, Ohio—brought a petition to deny the license renewals of stations WCOL (AM & FM). The Black Broadcasting Coalition (BBC) brought a petition to deny the license renewals of stations WBBW (AM & FM) in Youngstown, Ohio. Both petitions charge that the challenged stations have failed adequately to ascertain their community's needs and that they have discriminated against various minority groups in both their programming and employment practices.

If true, these claims would surely indicate that these stations have failed to serve the public interest. *See, e.g., Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971); *Radio Station WSNT, Inc.*, 27 FCC 2d 993 (1971); *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 FCC 2d 766 (1968), 18 FCC 2d 240 (1969), 23 FCC 2d 430 (1970). However, by holding that the pleadings of these petitioners have failed to raise "substantial or material questions of fact" sufficient to show that a grant of these renewals would be *prima facie* inconsistent with the public interest, the majority—with a casual wave of its collective hand—simply brushes these objections aside and grants the renewals.

Under the majority's Draconian approach to our vague, yet stringent pleading rules, these petitioners never really had a chance. I dissent.

In *Stone* v. *Federal Communications Commission*, —— F. 2d —— (D.C. Cir. 1972), 24 RR 2d 2105 (1972), the D.C. Circuit held that,

under § 309(d)(1) of the Communications Act of 1934, a petition to deny a licensee's renewal application does not mandate an evidentiary hearing unless that petition contains specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. Like the FCC, the Court merely parroted the language of the Act—failing to elucidate on the sort of allegations required.

As a result, the majority today—as it has done repeatedly in the past—leaves in total darkness those citizens who are concerned enough about the state of broadcasting in their communities to challenge a station's renewal application. These selfless citizens just keep filing their renewal challenges, and the majority—after some perfunctory analysis—just keeps telling them that their pleadings have failed to meet the requisite specificity.

Absent a clearer definition of precisely what that specificity "test" demands, I would think that—if we are truly interested in ensuring that our licensees are "serving the public interest" (a phrase upon which the majority has also consistently declined to elaborate)—we would at least give these challengers an opportunity to amend their complaints. *See* my dissent in *Letter to George Corey*, ——— FCC 2d ——— (1972). Absent such procedural flexibility, we are confronted with a pure adversary proceeding where the licensee's lawyers are pitted against the challengers—challengers who do not seek either control or ownership of the station, but whose sole desire is that the broadcaster better serve its community's needs. In such a system, the licensee will invariably win; but the public interest can only lose.

In such circumstances, I should think that this Commission—whose goals are, at least in theory, rather congruent with those of these and other challengers—could do better to help serve the public interest by making a greater effort to determine the truth.

For example, the BBC argues that, in ascertaining its community's needs, the Mahoning Valley Broadcasting Corporation, WBBW's licensee, failed to consult with any members of the community's Spanish-speaking minority—a minority which, according to the BBC, constitutes 8% of the population. This allegation is nowhere denied by the licensee. Yet, the majority finds no problems with the licensee's ascertainment study. Must the pleadings be more specific, or is the majority actually holding that a licensee need not consult with its community's minorities in ascertaining community needs? Surely, the majority cannot be reaching the latter conclusion. So, why doesn't it at least offer the petitioner some indication of the information it seeks?

In the case of WCOL, the petitioners charge the licensee with discriminatory hiring practices, something which our regulations specifically prohibit, See *Nondiscrimination Employment Practices of Broadcast Licensee*, *supra*, and a problem we have sought recently to correct—though in a rather chaotic, half-hearted manner. See my separate statement in the *Pennsylvania-Delaware Renewals*, ——— FCC 2d ——— (1972), and the subsequent *Pennsylvania-Delaware Equal Employment Opportunity Inquiries*, ——— FCC 2d ——— (1972), and also in the *Washington, D.C., Maryland, Virginia, West Virginia Letters of Inquiry*, released this day.

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The majority notes that the licensee's staff is 8% black and that this figure is "reasonable" given the fact that the community is 11.6% black. Aside from this totally ad hoc, unsupported declaration, the majority does not even pause to inquire as to the positions held by these minority members, nor does the majority ask whether this 8% figure represents a reduction in the number of black employees at the stations between 1971 and 1972.

In *Pennsylvania-Delaware Renewals*, *supra*, the FCC agreed that a reduction in black employment during the last two years should arouse our suspicion and should thus warrant further investigation into a licensee's hiring practices. Had the majority so inquired of Great Trails—an inquiry which demands no more than a glance at the licensee's Annual Employment Report, Form 395—the majority would have discovered that while the station employed eight blacks in 1971—in both full and part time positions—the station employed only seven in 1972.

Since the majority is obviously not going to investigate on its own, it should, at the very least, give the petitioners an opportunity to amplify their complaint.

Indeed, the majority has no problems permitting a licensee—who should not need such favored treatment—the right to amplify and to update its filings. In response to petitioners' claim that Great Trails' efforts at ascertaining its community's needs for the coming years were inadequate, the majority suggests that Great Trails could amend its renewal applications pursuant to § 1.522(a) of the rules, 47 CFR § 1.522 (a), by conducting a further ascertainment of community problems.

In *Stone* v. *Federal Communications Commission*, *supra*, the Court held that a licensee could, under § 1.522(a), amend its ascertainment study prior to Commission scrutiny in a renewal proceeding. However, the renewal applicant in that case had sought to amend its ascertainment study on its own motion, well before final Commission action on both the application and an opposing petition to deny. The Court held only that new ascertainment efforts, at that stage of the proceedings, did not violate our policy against upgrading, on the theory that ascertainment is prospective in nature.

There is some question—at least in my mind—about whether the *Stone* court would reach the same result where a licensee does not, on its own, find any difficulties with its ascertainment survey, but, rather, submits that study to the Commission and rests. In short, I am not convinced that just because an applicant is able to amend its ascertainment study *prior to* a Commission decision upon the merits of that survey, an applicant may amend its survey *after* the Commission has ruled it inadequate. For, in the latter case, the licensee's stubborn refusal to consult properly with its community of service should, I would think, merit *some* form of disapprobation.

But, assuming that the majority is correct in its reading of *Stone*, I cannot see why that majority distinguishes so invidiously between a licensee's right to amend its ascertainment study and, hence, its renewal application, and the right of a concerned citizen's group to amplify its pleadings. This sort of unequal treatment reveals, better than I

could ever hope to accomplish, the majority's preference for our licensees at the public's expense.

If we are truly concerned about the failure of these petitioners to offer us the required specificity, then we ought to so advise them and then give them at least one opportunity to try again. To do otherwise, especially while, at the same time, giving our licensees a second bite of the ascertainment apple, is not merely inequitable, and not merely contrary to the public interest which we are directed by Congress to protect—it is simply outrageous.

I dissent.

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS, CONCURRING IN PART; DISSENTING IN PART

In Re: Renewal Proceedings in Youngstown and Columbus, Ohio

I concur with the majority on these cases insofar as its holding that the petitions to deny filed by the respective community groups do not attain—or candidly, even proximately attain—the procedural standard of specificity mandated by the Communications Act.[1] It is a hackneyed, but nonetheless true, legal bromide that bad cases make bad law. Vague invective and wide-brush critique in a legal pleading requiring factual precision provides the (justifiably) ideal juridical basis for dismissal. Interested parties must dig deep, make the effort to pinpoint and factually support the exact abuses of which they complain so as to render summary rejection, with attendant loss of credibility, illegal if not impossible.

My point of departure and dissent from my colleagues stems from the fact that the perceived deficiencies in the petitioners' pleadings eliminates only inadequate petitioners from the renewal byplay—it in no way eliminates the Commission itself. As the principal monitors of broadcaster performance, we have the main statutory duty to investigate licensee activities; especially when confronted with earnest complaints from the neighbors. The Commission frequently acts on its own volition in withholding renewals when it suspects delinquencies. It should not stand behind a procedural barrier on the apparent side of a licensee and let the matter ride simply because a complainant is without the assiduity, resources or legal acumen to mount a perfect attack.[2] Rather, the Commission should be on all sides looking critically

[1] Specifically, 47 U.S.C. § 309(d)(1). It must be conceded that Congress intended a strict standard when amending the statute to permit petitions to deny. Congress expected:

"... a substantially stronger showing of a greater probative value than is necessary now in the case of a post grant protest. The allegations of ultimate, conclusionary facts or mere general affidavits ... are not sufficient." S. Report No. 690, 86th Cong., 1st Session, p. 3 (1959).

See *Stone* v. *F.C.C.*, Case No. 71–1166 (D.C. Cir. June 30, 1972). But see, *Marine Space Enclosures, Inc.* v. *FMC*, 137 U.S. App. D.C. 9, 18 (Note 22) (1969) where the court observed that "[P]rocedural requirements depend in part on the importance of the issues before the agency."

[2] That the Commission need not depend solely on the procedural sufficiency of denial petitions in determining the propriety of license renewal is clearly enunciated in 47 U.S.C. § 307. In pertinent parts, that Section provides that the Commission "may officially notice" (§ 307(d)(2)) facts and circumstances and if the Commission is "for any reason unable to make the [public interest, convenience and necessity] finding specified ... it shall formally designate the application for hearing on the ground or reason then obtaining". It is axiomatic that before the Commission can find "any reason" it must first look.

in; not at the quality of the complainants' performance—we do not license complainants—but at the activities of the station.[3]

Accordingly, while I don't believe the Commission's action here is wholly unwarranted, it certainly could have gone further in fulfilling its own statutory function in these cases.

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[3] For an astringent reminder of the Commission's appropriate role in these renewal triangles, see Judge Burger's opinion in *Office of Communications of the United Church of Christ* v. *F.C.C.*, 138 U.S. App. D.C. 11, 425 F. 2d. 543 (1969).

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
ANTHONY R. MARTIN-TRIGONA, CHAMPAIGN, ILL.
To Revoke the License of Station WCIA–TV, Champaign, Ill.

JANUARY 17, 1973.

Mr. ANTHONY R. MARTIN-TRIGONA,
Box 2508, Station A,
Champaign, Ill.

DEAR MR. MARTIN-TRIGONA: This refers to a letter from you received by the Commission May 17, 1972, which you ask "be taken as a request and petition to revoke the license of WCIA–TV, Channel 3, Champaign, Illinois."

You allege that the station has harassed you; that it carried a news broadcast which was inaccurate and misleading, and it sent a reporter to disrupt a news conference called by you; that the station refused access to the airwaves to you by refusing to give you time or to sell you time at a discount; and that "while ceaseless efforts are made to discredit" you, "similar efforts are made to glorify" a conservative legislator who is a law partner of the owner of the station.

By letter dated June 7, 1972, the licensee responded to your complaint through its counsel, Mr. Ernest W. Jennes. This response disputes most of the allegations set forth in your complaint and states that you have not shown in your letter that WCIA has harassed you or your activities. Attached to the licensee's response are copies of news stories to which you refer, court records upon which the licensee states the news reports were based, and a news report of your press conference, quoting similar charges by you against the licensee and a statement by you that you were asking this agency to revoke the license of WCIA.

Mr. Jennes' letter indicates that a copy was sent to you. However, the Commission has no record of receiving any comment from you upon the licensee's response or any refutation of it.

In light of this fact and of the fact that your allegations against the licensee are lacking in supporting evidence, it appears that no further Commission action is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Wash-

ington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73-76

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
ORANGE CABLEVISION, INC., MAITLAND, FLA.	CAC-144. FL194
ORANGE CABLEVISION, INC., BELLE ISLE, FLA.	CAC-145. FL195
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 26, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, H. REX LEE AND REID CONCURRING IN THE RESULT; COMMISSIONER JOHNSON ABSENT.

1. On April 6, 1972, Orange Cablevision, Inc., filed applications for certificates of compliance for new cable television systems to operate at Maitland, Florida, and Belle Isle, Florida, both of which are located within the specified zones of the Orlando-Daytona Beach, Florida market (the 55th largest), and each of which will operate from the same head end. Each system proposes to provide the following Florida television signals to subscribers: WDBO-TV (CBS), WMFE-TV (Educ.) and WFTV (ABC), Orlando; WESH-TV (NBC), Daytona Beach; WUFT (Educ.), Gainesville; WEDU (Educ.), WUSF-TV (Educ.), and WTOG-TV (Ind.), Tampa; and WLTV (Spanish language) and WCIX (Ind.), Miami.[1] Public Notice of these applications was given April 26, 1972. And on May 15, 1972, the licensee of Station WMFE-TV, Orlando, Florida, filed a "Petition of Florida Central East Coast Educational Television, Inc." with respect to these applications.

2. On January 19, 1972, Orange requested waiver of former Section 74.1107(a) of the Commission's Rules to allow it to carry the distant signals of WUFT, WEDU, and WUSF-TV on its proposed system at Maitland. In the absence of objection of any sort, on February 28, 1972, the Chief, Cable Television Bureau, acting pursuant to authority delegated in Section 0.289(c)(12) of the Rules, granted Orange's request. A similar request was filed for Belle Isle on October 5, 1971, and similarly was granted December 2, 1971. Notwithstanding this history, Florida Central urges that we refuse to authorize Orange to carry the distant in-state signals on its proposed systems. In support of its request, Florida Central argues (a) that importation of distant educational signals will adversely affect its economic viability, (b) that earlier personnel of the station did not recognize the importance of distant signals; and (c) that the systems here proposed are within WMFE-TV's "sphere of influence." With respect to (c), on May 1, 1972, the managers of Educational Stations WEDU-TV, Tampa;

[1] A construction permit is outstanding for WSWB-TV, Orlando, and Orange wishes to carry it when it begins operation.

WJCT, Jacksonville; WUFT, Gainesville; and WMFE–TV, signed a joint agreement recognizing WMFE–TV's sphere of influence and stating that "we wish to express our desire that the other noncommercial signals being imported by CATV systems in the WMFE–TV sphere of influence be removed."

3. We rule on Florida Central's objections as follows: (a) (b) The allegations of possible impact are broad and only generally supported; nonetheless, it is not unlikely that they could prevail in the absence of countervailing considerations. Compare par. 94–95, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 180, and *Norristown Distribution Systems, Inc.*, FCC 72–1095, —— FCC 2d ——. Such considerations seem present here in Florida Central's earlier failure to object to Orange's proposals which have led both Orange and the Commission to consider the question of distant educational signals on Orange's systems to be settled. While we recognize that educators may be pressed for finances or facilities to object fully to cable proposals, we do not believe that complete silence should be overlooked or that we should act to disturb this situation where the signals involved are clearly grandfathered, and (c) we are not persuaded of any public interest which requires that we recognize a "sphere of influence" for WMFE–TV which should prevent importation of in-state educational stations. See *Information Transfer, Inc.*, FCC 72–1094, ———FCC 2d———. In addition to these matters, we note *sua sponte* that Orange's franchises [2] are not fully consistent with Section 76.31 of the Rules (for example, the Belle Isle franchise has a 6% fee and the Maitland franchise has a fee of at least 7%). Nonetheless, our review of the franchises satisfies us that they are in substantial compliance with our rules sufficient to justify a grant until March 31, 1977. E.g., CATV of Rockford, Inc., FCC 72–1005, ———FCC 2d———.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition of Florida East Coast Educational Television, Inc." filed May 15, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–144, CAC–145) ARE GRANTED and appropriate certificates of compliances will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[2] The Maitland franchise was granted December 14, 1971, and the Belle Isle franchise was granted August 4, 1970.

F.C.C. 73–79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re ORANGE CABLEVISION, INC. WINDERMERE, FLA. For Certificate of Compliance	CAC–143 FL193

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, H. REX LEE AND REID CONCURRING IN THE RESULT; COMMISSIONER JOHNSON ABSENT.

1. On April 6, 1972, Orange Cablevision, Inc., filed an application for certificate of compliance for a new cable television system to operate at Windermere, Florida, which is located within the specified zones of the Orlando-Daytona Beach, Florida market (the 55th largest). The system proposes to provide the following Florida television signals to subscribers: WDBO–TV(CBS), WMFE–TV(Educ.) and WFTV(ABC), Orlando; WESH–TV(NBC), Daytona Beach; WUFT(Educ.), Gainesville; WEDU(Educ.), WUSF–TV(Educ.), and WTOG–TV (Ind.), Tampa; and WLTV (Spanish language) and WCIX (Ind.), Miami.[1] Public notice of the application was given April 26, 1972. And on May 15, 1972, the licensee of Station WMFE–TV, Orlando, Florida filed a "Petition of Florida Central East Coast Educational Television, Inc." with respect to the application.

2. On October 5, 1971, Orange requested waiver of former Section 74.1107(a) of the Commission's Rules to allow it to carry the distant signals of WUFT, WEDU, and WUSF–TV on its proposed system at Windermere. In the absence of objection of any sort, on December 2, 1971, the Chief, Cable Television Bureau, acting pursuant to authority delegated in Section 0.289(c)(k) of the Rules, granted Orange's request. Notwithstanding this history, Florida Central urges that we refuse to authorize Orange to carry the distant in-state signals on its proposed system. In support of its request, Florida Central argues (a) that importation of distant educational signals will adversely effect its economic viability, (b) that earlier personnel of the station did not recognize the importance of distant signals; and (c) that the system here proposed is within WMFE–TV's "sphere of influence." With respect to (c), on May 1, 1972, the managers of Educational Stations WEDU–TV, Tampa, WJCT, Jacksonville; WUFT, Gainesville; and WMFE–TV, signed a joint agreement recognizing WMFE–TV's sphere of influence and stating that "we wish to express our desire that the other noncommercial signals being imported by CATV systems in the WMFE–TV sphere of influence be removed."

[1] A construction permit is outstanding for WSWB-TV, Orlando, and Orange wishes to carry it when it begins operation.

3. We rule on Florida Central's objections as follows: (a) (b) The allegations of possible impact are broad and only generally supported. Nonetheless, it is not unlikely that they could prevail in the absence of countervailing considerations. Compare par. 94–95, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 180, and *Norristown Distribution Systems, Inc.*, FCC 72–1095, ——— FCC 2d ———. Such considerations seem present here in Florida Central's earlier failure to object to Orange's proposal which has led both Orange and the Commission to consider the question of distant educational signals on Orange's system to be settled. While we recognize that educators may be pressed for finances or facilities to object fully to cable proposals, we do not believe that complete silence should be overlooked or that we should act to disturb this situation where the signals involved are clearly grandfathered, and (c) we are not persuaded of any public interest which requires that we recognize a "sphere of influence" for WMFE–TV which should prevent importation of in-state educational stations. See *Information Transfer, Inc.*, FCC 72–1094, ——— FCC 2d ———. In addition to these matters, we note *sua sponte* that Orange's franchise [2] is not fully consistent with Section 76.31 of the Rules (for example, it contains a franchise fee which can reach 8½%). Nonetheless, our review of the franchise satisfies us that it is in substantial compliance with our rules sufficient to justify a grant until March 31, 1977. E.g., *CATV of Rockford, Inc.* FCC 72–1005, ——— FCC 2d ———.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition of Florida East Coast Educational Television, Inc." filed May 15, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–142) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] The franchise was granted January 18, 1971.

F.C.C. 73-81

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
ORANGE CABLEVISION, INC., APOPKA, FLA.	CAC-142
For Certificate of Compliance	FL192

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, H. REX LEE AND REID CONCURRING IN THE RESULT.

1. On April 6, 1972, Orange Cablevision, Inc., filed an application (CAC-142) for certificate of compliance for a new cable television system to serve approximately 5,800 persons at Apopka, Florida, which is located within the specified zones of the Orlando-Daytona Beach, Florida market (the 55th largest). The system proposes to provide the following Florida television signals to subscribers: WDBO-TV (CBS), WMFE-TV (Educ.), and WFTV (ABC), Orlando; WESH-TV (NBC), Daytona Beach; WUFT (Educ.), Gainesville; WEDU (Educ.), WUSF-TV (Educ.) and WTOG-TV (Ind.), Tampa; and WLTV (Spanish language) and WCIX (Ind.), Miami.[1] Public notice of this application was given April 12, 1972. And on May 15, 1972, the licensee of Station WMFE-TV, Orlando, Florida, filed a "Petition of Florida Central East Coast Educational Television, Inc." with respect to this application.

2. The present application is one of a number filed in the Orlando area by Orange (and the related company, Seminole Cablevision, Inc.). In the other applications, carriage of the distant in-state educational signals was earlier authorized and hence grandfathered under the Commission's cable television rules. There is no such grandfathering in this case. Florida Central urges that we refuse to authorize Orange to carry the distant in-state signals on its proposed systems. In support of its request, Florida Central argues (a) that importation of distant educational signals will adversely affect its economic viability, (b) that earlier personnel of the station did not recognize the importance of distant signals; and (c) that the system here proposed is within WMFE-TV's "sphere of influence." With respect to (c), on May 1, 1972, the managers of Educational Stations WEDU-TV, Tampa; WJCT, Jacksonville; WUFT, Gainesville; and WMFE-TV, signed a joint agreement recognizing WMFE-TV's sphere of influence and stating that "we wish to express our desire that the other noncommercial signals being imported by CATV systems in the WMFE-TV sphere of influence be removed."

[1] A construction permit is outstanding for WSWB-TV, Orlando, and Orange wishes to carry it when it begins operation.

3. We rule on Florida Central's objections as follows: (a) (b) The allegations of possible impact are broad and only generally supported; nonetheless, it is not unlikely that they could prevail in the absence of countervailing considerations. Compare par. 94–95, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d, 143, 180, and *Norristown Distribution Systems, Inc.*, FCC 72–1095,———FCC 2d———. Such considerations seem present here in Florida Central's earlier failure to object to Orange's other proposals in the Orlando area which have led both Orange and the Commission to consider the question of distant educational signals on Orange's systems to be settled. In view of the small size of the proposed Apopka system, and the fact that we are approving carriage of the distant in-state educational signals to all other cable television systems operating from the same head end, we do not believe it would be desirable to disrupt the Orlando-area plans on this system only. (c) We are not persuaded of any public interest which requires that we recognize a "sphere of influence" for WMFE–TV which should prevent importation of in-state educational stations. See *Information Transfer, Inc.*, FCC 72–1094, ———FCC 2d ———. In addition to these matters, we note *sua sponte* that Orange's franchise [2] is not fully consistent with Section 76.31 of the Rules (for example, an initial franchise fee of 8% which falls to 5% after three years). Nonetheless, our review of the franchise satisfies us that it is in substantial compliance with our rules sufficient to justify a grant until March 31, 1977. E.g., *CATV of Rockford, Inc.*, FCC 72–1005, ——— FCC 2d———.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition of Florida East Coast Educational Television, Inc." filed May 15, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–142) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] The franchise was granted February 24, 1972.

F.C.C. 72-1172

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
PENNSYLVANIA HUMAN RELATIONS COMMISSION CONCERNING EMPLOYMENT DISCRIMINATION COMPLAINT BY MS. LUE EDNA MORGAN

DECEMBER 20, 1972.

MR. HOMER C. FLOYD, *Executive Director, Commonwealth of Pennsylvania, Governor's Office, Human Relations Commission, Post Office Box 3154, Harrisburg, Pa. 17105*

DEAR MR. FLOYD: This is in reference to your letters dated May 15, July 27 and August 7, 1972, concerning Stations KQV, WDVE-FM, WEDO, WAMO-AM-FM, WJAS-AM-FM, WTAE-TV, KDKA-AM-FM-TV, WIIC-TV, WQED-TV and WQEX-TV, all of which are located in the Pittsburgh, Pennsylvania area.

Your letters pertain to a complaint of employment discrimination filed against each of the above-noted stations by Ms. Lue Edna Morgan, also known as and doing business as Etta Moro Morgan. Ms. Morgan charges each of the stations with discriminating against her in their hiring practices for such positions as host, producer, announcer and news reporter. Ms. Morgan also charges the stations with otherwise maintaining limited employment opportunities for blacks, women and women age forty and over.

Pursuant to your request the Commission's staff has deferred final action on the renewal applications for the above-noted stations since August 1, 1972. However, based upon our review of the information available, the Commission is of the opinion that it should not continue to defer action on the basis of Ms. Morgan's complaint. As we stated in our 1969 *Report and Order*, 18 FCC 2d 240, wherein we adopted rules pertaining to non-discrimination in broadcast employment, not every complaint of an isolated action, even if substantial, will warrant deferring action on a renewal application. It has, therefore, been the Commission's practice not to defer action on renewal applications on the basis of a discrimination complaint being investigated by another federal, state, or local agency. Rather, in such cases, the Commission will defer action to the appropriate federal, state, or local agency and, if necessary, take action after that agency has made its final determination.

We would appreciate being notified of any determinations which are made and any action which is taken by the Pennsylvania Human Relations Commission in connection with your current investigations.

Commissioner Johnson dissenting and issuing a statement, Commissioner Hooks dissenting.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

Today the Federal Communications Commission precludes a state's civil rights commission from filling the void which we euphemistically describe as our "equal employment opportunities program."

Since August 1, 1972, this Commission has deferred action on the renewal applications of numerous broadcast stations in the Pittsburgh, Pennsylvania, area. That action was requested by the Pennsylvania Human Relations Commission (PHRC), which organization was, and still is, investigating complaints of employment discrimination filed against these stations.

In theory, the FCC has its own procedures for ensuring that our licensees do not engage in discriminatory employment practices. *See Nondiscrimination Employment Practices of Broadcast Licensees*, 13 FCC 2d 766 (1968); 18 FCC 2d 240 (1969); 23 FCC 2d 430 (1970); *Pennsylvania and Delaware Renewals*, 36 FCC 2d 515 (1972). However, as I have remarked on prior occasions, *see Pennsylvania and Delaware Renewals—Equal Employment Opportunity Inquiries*, ——— FCC 2d ——— (1972), our efforts in this area are, by and large, laughable.

The PHRC has, in essence, offered to do at least part of our job for us. Since the majority is not willing to determine for itself whether its licensees in the Pittsburgh area have engaged in discriminatory employment practices, *see, e.g., Pennsylvania and Delaware Renewals—Equal Employment Opportunity Inquiries, supra*, the PHRC has determined to make that effort and, thus, to fill the void which we created.

The majority's reaction to the state agency's gesture is to renew each of the contested licenses. The state has deemed the complaints made against these stations serious enough to warrant both an investigation and a request to this Commission for deferral. The majority, however, literally ignores the state's judgment and pays no heed to traditional notions of comity. It is as if this Commission had renewed several licenses in the face of pending and unresolved petitions to deny those license renewals based on grounds of discriminatory employment practices.

At best, the majority has exhibited considerable disrespect for an important agency of the Pennsylvania state government. At worst, the majority has confirmed once again that it is simply not terribly troubled by the fact that large numbers of our licensees might well be engaging in discriminatory employment practices.

I dissent.

F.C.C. 72-1173

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notice of
REQUEST FOR WAIVER OF PRIME TIME ACCESS RULE

DECEMBER 20, 1972.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), ROBERT E. LEE, H. REX LEE, REID, WILEY AND HOOKS, WITH COMMISSIONER JOHNSON ABSTAINING FROM VOTING, ISSUED THE FOLLOWING PUBLIC NOTICE.

NOTICE OF REQUEST FOR WAIVER OF PRIME TIME ACCESS RULE

Public Notice is hereby given of a request for waiver of the "prime time access rule", Section 73.658(k) of the Commission's Rules, filed on November 29, 1972 by Children's Television Workshop (CTW) ("Petition by Children's Television Workshop"). The request seeks waiver of the limitation on network prime-time programming (to three hours a night) so as to permit a network to present a prime time half-hour weekly children's program, to the extent of 26 original programs and 26 repeats, starting about January 1974, in addition to the usual three hours of network programming.

In line with a policy recently adopted concerning requests for waiver of the "off-network" provisions of the rule,[1] it is believed that interested parties should have opportunity to comment on this request before the Commission considers it. Accordingly, notice is hereby given that no action will be taken by the Commission at least until January 31, 1973, and that interested parties may file comments concerning the request through January 12, 1973. Petitioner, or other parties wishing to reply to comments concerning the petition, may file replies through January 22, 1973.

Issuance of this public notice does not represent any Commission view as to the merit of the request, or as to whether it will be appropriate to reach any decision as to it in advance of the over-all rule making proceeding decision concerning the prime time access rule, Docket 19622. The latter is expected early next spring.

Copies of the CTW petition, and of any responsive comments which are filed, may be examined at the Commission's Office of Network Study, Room A-323, Federal Communications Commission Annex (Howitch Building), 1229 20th Street, N.W., Washington, D.C.

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[1] See *Time-Life Films*, FCC 72-985, 25 R.R. 2d 793, released November 9, 1972. The present request involves network programming, rather than the "off-network" waiver requests specifically dealt with in that decision and the procedure set forth therein; but the general considerations involved are much the same, so that public notice in the present case is appropriate also.

F.C.C. 72-1032

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
INTERIM POLICY FOR NETWORK-SHOWN MOVIES IN RELATION TO THE "OFF NETWORK" AND "FEATURE FILM" PROVISIONS OF THE PRIME TIME ACCESS RULE (SEC. 73.658(k)(3))

NOVEMBER 17, 1972.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), ROBERT E. LEE, REID, WILEY AND HOOKS, WITH COMMISSIONER JOHNSON DISSENTING AND COMMISSIONER H. REX LEE DISSENTING AND ISSUING A STATEMENT, ISSUED THE FOLLOWING PUBLIC NOTICE.

INTERIM POLICY WITH RESPECT TO NETWORK-SHOWN MOVIES IN RELATION TO THE "OFF-NETWORK" AND "FEATURE FILM" PROVISIONS OF THE PRIME TIME ACCESS RULE (§ 73.658(k)(3))

Effective October 1, 1972, Section 73.658(k)(3) of the Commission's Rules, part of the Prime Time Access Rule, provides that the portion of prime time from which network programs are excluded may not be filled with:

"off-network programs; or feature films which within two years prior to the date of broadcast have been previously broadcast by a station in the market."

A number of parties have raised the question as to how a "feature film" previously presented in the market as a network program is affected by the rule: is it an "off-network program" and therefore barred permanently from the cleared portion of prime time, or a "feature film" so barred only for two years after its previous broadcast in the market?

The question has also been asked as to whether a film is regarded as "feature film" in this connection even if it was originally produced for television, rather than theatre, exhibition.

The rule in these respects is not clear. Clarification and possible modification of it in these respects, as well as other questions concerning the showing of movies in "cleared" prime time, are included in the general Notice of Inquiry and Notice of Proposed Rule Making adopted October 26, 1972, in Docket 19622 (pars. 41–44). Decision in this proceeding is expected early in 1973, and rule changes adopted in these areas are likely to be made effective October 1, 1973, or before.

In view of the short period anticipated before that decision, and since there appears to be no urgent need for action this season in light of present patterns of operation, there is no need for a formal interpretation of the present rule. Rather, it is appropriate simply to state that the Commission will not take enforcement action against licensees

who have construed the rule in the more liberal fashion, and whose stations therefore are presenting or will present movies shown on a network more than two years before, including both movies made for theatre use and those made primarily for television.

It is emphasized that this policy will apply only until the decision in the Docket 19622 proceeding and the effective date of the rule changes in this respect adopted therein. Parties are on notice that such changes may include adoption of the more restrictive interpretation mentioned above, treating network-shown movies as "off-network" programs.

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE

Section 73.658(k)(3) of the "Prime Time Access Rule" provides that the portion of prime time from which network programming is excluded may not be filled with "off-network programs" or "feature films which within two years prior to the date of broadcast have been previously broadcast by a station in the market." Several affected parties have raised questions concerning the effect of the rule on "feature films" previously presented in a market as network programs. They have asked whether such films are to be considered "off-network programs," which are barred permanently from the cleared portion of prime time, or "feature films," which are barred only for two years after their previous broadcast in a market. The majority prefers to avoid clarification of the rule at this time since: (1) the rule is ambiguous insofar as a distinction between "off-network programs" and "feature films" is concerned; and (2) similar questions have been raised in the Commission's *Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 19622*, adopted October 26, 1972, which is expected to be concluded expeditously. In the meantime, the majority indicates that it will not take enforcement action against any licensee who has construed the rule liberally in regard to the broadcast of feature films previously shown by a network, including films made for theatre distribution and those made primarily for television exhibition. Since I cannot agree with such an approach, I have dissented to the issuance of the Public Notice.

Our announced intent in adopting the "Prime Time Access Rule" was to correct the obvious imbalance in television production and distribution processes, which worked to the disadvantage of independent program producers. In effect, the Commission attemped to lessen the high degree of network domination of station operation and to provide a healthy impetus to the development of new program sources and ideas. Therefore, in the *Report and Order in Docket No. 12782*, 23 FCC 2d 382, 18 RR 2d 1825 (1970), we provided that stations in the top 50 television markets could not fill the cleared portion of prime time with "off-network syndicated series programs" or "feature films previously broadcast in the market." In regard to the feature film prohibition, the Commission stated:

> We have also dealt with feature film in this respect, because if the network affiliates were to adopt the general practice of substituting feature film for network fare as a means of meeting the requirements of our rules, it would frustrate

109-025—73——6

the purposes of the rule. We have therefore also proscribed the use of feature film which has been previously broadcast in the market as a means of meeting the requirements of the rule. See 23 FCC 2d at 395, 18 RR 2d at 1843.

In affirming the rule generally on reconsideration, we indicated that Section 73.658(k)(3) does not prevent an affiliate from "substituting its own feature film for a network feature or for other network programming." 25 FCC 2d 318, 333, 19 RR 2d 1869, 1888 (1970). This language clearly indicated an intent to preclude the use of feature films by stations during the cleared portion of prime time. While the provision was amended to incorporate a two-year limitation on the prohibition against the rebroadcast of feature films, the modification was meant only to ease the administrative burden on stations in determining what feature films have been previously broadcast in the market. It is more than apparent that the two-year limitation was not intended to create a distinction between "off-network programs" and "feature films" so that films carried by networks could not be classified as "off-network programs" or films produced for initial television exhibition could qualify for the "feature film" provision.

Since the "Prime Time Access Rule" is in full force and effect today, we should consider requests for clarification of its provisions even though the very matters raised by affected parties are contained in the current *Notice of Inquiry*. I do not think that it is wise to indicate that we will not enforce requirements of the rule against those licensees who may have construed its provisions in a manner to conform to their own personal interests. In effect, the failure to enforce the rule is as much an action as a clarification or interpretation since it frustrates the announced purpose of the rule, *i.e.*, to clear a portion of prime time for local and non-network programming. Admittedly, the language of our rule is not precise—many of our regulations suffer from the same infirmity and require *ad hoc* interpretation—however, our decision here should be a relatively easy one to make in light of the objectives of the rule. In order to make more prime time available to independent program producers and to discourage the presentation of feature films by stations during the cleared portion of prime time, we should hold that feature films carried by a network—whether intended for theatre or television exhibition—are to be treated as "off-network programs" and are barred permanently from the cleared portion of prime time. Consistent with such an interpretation, the only feature films that would be available for station use in "cleared" prime time would be those network-originated films that had not been carried in a particular market and those that had not been shown on a network and had not been broadcast in a market for two years.

In my own opinion, therefore, the more forthright approach would be to honor requests for clarification of an existing rule that has substantial impact on affected parties. While I am aware of the fact that some licensees have invested funds in the acquisition of film rights on the basis of a "liberal" interpretation of Section 73.658(k)(3), I do not find that consideration to be dispositive, especially in light of the clearly articulated purpose of the rule. Moreover, it should be noted that the effective date of the rule was postponed to permit the unrestricted use of programming already purchased by stations. The further fact that we have initiated an inquiry into the effect and oper-

ation of the "Prime Time Access Rule" should likewise provide no basis for retreat from full enforcement of its provisions. In this regard, I should add that my views here do not constitute a prejudgment of the matters raised in Docket No. 19622—to the contrary, I specifically reserve the right to review these matters in the context of that proceeding.

For these reasons, I am unable to join with the majority in the issuance of the Public Notice.

F.C.C. 73-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RADIO STAMFORD, INC., STAMFORD, CONN. Requests 1400 kHz, 250 W, 1 kW-LS, U (the Facilities of WSTC) For Construction Permit	File No. BP-19162

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 24, 1973)

BY THE COMMISSION.

1. The Commission has before it for consideration (i) a petition for reconsideration filed by Radio Stamford, Inc.; (ii) a Western Connecticut Broadcasting Company opposition thereto; and (iii) the petitioner's reply.[1]

2. On October 7, 1970, the Commission adopted an order and notice (FCC 70-1093, released October 8, 1970, Docket No. 19043) directing Western Connecticut Broadcasting Company to show cause why an order revoking the licenses of stations WSTC (AM, FM), Stamford, Connecticut, should not be issued, and notifying it that, alternatively, it could be liable for a $10,000 forfeiture. The WSTC licenses were not due to expire until April 1, 1972. After the record in the revocation proceeding had been closed, the licensee filed its renewal applications, and Radio Stamford thereafter filed a timely competing application against the WSTC(AM) renewal application.

3. The Commission, by its Memorandum Opinion and Order, 35 FCC 2d 776 (1972), accepted Radio Stamford's application for filing, but delayed further action on it until resolution of the related revocation proceeding, in view of the fact that the record in that proceeding had been closed and proposed findings had already been filed. The petitioner seeks reconsideration of this deferral, specifically, termination of the revocation proceeding and designation of the WSTC renewal application and its competing application for comparative hearing. An Initial Decision was released in the revocation proceeding on August 4, 1972, exceptions thereto were filed on October 2, 1972, and the matter is now awaiting oral argument.

4. The petitioner argues that any further delay in commencement of a comparative renewal hearing would be prejudicial to the public interest as tending to stifle the competition vital to responsive, public-spirited broadcasting. It is our view that healthy competition is not chilled where, as here, a revocation proceeding already far advanced continues beyond the end of the three-year license term. On the con-

[1] In addition, Radio Stamford filed a "Petition for Leave to Supplement Petition for Reconsideration" and a "Supplement to Petition for Reconsideration," and WSTC filed an opposition thereto.

trary, the license remains in jeopardy until our final decision in the matter and, if the license should be revoked, the WSTC renewal application will be dismissed, Radio Stamford's application will receive its own cut-off date, and the Commission will consider all timely filed applications, not just that of Radio Stamford, Inc.[2]

5. The petitioner's other arguments were fully discussed and considered in our Memorandum Opinion and Order, 35 FCC 2d 776, *supra*, and it is not necessary to repeat that discussion here. It suffices to say that our reasons for refusing to terminate the revocation proceeding and institute a comparative renewal-new application proceeding are even more compelling now, because of the advanced status of the revocation proceeding. The petitioner has made no new arguments, and has cited no case law not previously considered by the Commission.

6. The petitioner has requested leave to supplement its petition with a discussion of *Seaboard Broadcasting Corp.*, FCC 70–272, 18 RR 2d 849 (1970), which is clearly distinguishable. There the revocation proceeding had not even begun when it was consolidated with the renewal proceeding. *Leflore Broadcasting Co.*, 36 FCC 2d 101 (1972), also cited by the petitioner, is inapposite since, while Radio Stamford's petition comes near the end of the hearing process, in *Leflore* a hearing has not even been ordered, much less completed.

7. For the reasons stated above and in our previous Memorandum Opinion and Order, the petition for reconsideration and the petition for leave to supplement the petition for reconsideration ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] As we indicated previously, if WSTC's license is not revoked its renewal application and Radio Stamford's application will be designated for comparative hearing.

F.C.C. 72D–76

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE SANDHILL COMMUNITY BROADCASTERS, INC., SOUTHERN PINES, N.C. For Construction Permit	Docket No. 19350 File No. BPH–7444

APPEARANCES

Benedict P. Cottone and *David Meyers* for Sandhill; and *Gerald M. Zuckerman* and *Katherine Savers McGovern* for the Chief, Broadcast Bureau, Federal Communications Commission. (Arthur V. Weinberg and John E. Fiorini III appeared for William R. Gaston, Docket No. 19349, File No. BPH–7380, whose application has since been granted, see FCC 72M–1404.)

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE HERBERT SHARFMAN

(Issued November 24, 1972; Effective January 19, 1973 pursuant to Section 1.276 of the Commission's Rules)

FINDINGS OF FACT, CONCLUSIONS, AND ORDER

1. This document issues in the form of an Initial Decision on the remaining matter applicable to Sandhill, though its application has been dismissed, pursuant to an agreement and joint request, by order released November 14, 1972 (FCC 72M–1404).

2. The proceeding had been designated for hearing to determine the comparative merits of William R. Gaston and Sandhill, both applicants for FM Channel 296 in Southern Pines. After the initial designation, the Review Board enlarged the issues against Sandhill as follows (35 F.C.C. 2d 624, 632):

> **To determine the efforts made by The Sandhill Community Broadcasters, Incorporated to ascertain the community needs and interests of the area to be served by its proposed station and the means by which the applicant proposes to meet those needs and interests; and**
>
> **To determine whether The Sandhill Community Broadcasters, Incorporated has failed to comply with the provisions of Sections 1.514(a) and 1.65 of the Commission's Rules and, if so, to determine the effect of such non-compliance upon the applicant's basic or comparative qualifications to be a Commission licensee.**

Before the hearing of November 1, 1972, the applicants entered into a dismissal agreement calling for a grant of Gaston's application and reimbursement of Sandhill for its expenses in an amount approved by the Commission up to $8500. As noted above, Gaston's application has been granted. Payment to Sandhill is dependent upon a favorable ruling on the Rules 1.514(a)–1.65 issue—the comparative and community survey issues are now moot. Evidence at the hearing was appropriately limited. Sandhill and the Bureau filed proposed findings of

fact and conclusions on November 21, 1972. Although Sandhill's proposed findings are entirely adequate, in the interest of convenience the following paragraphs are taken, with only a few changes, mainly editorial, from the Bureau's pleading.

3. Sandhill's application was filed on April 5, 1971. Section II of the application shows that Jack S. Younts (President of Sandhill) owned a 50% interest and was an officer and director of Sandhill Community Antenna Corporation from 1965–1970. The application did not report any interest by Younts in SCAC beyond 1970.

4. SCAC has been awarded three CATV franchises, including one for Southern Pines on June 9, 1970. Until January 15, 1971, Younts was an officer, director and 50% owner of SCAC. On that date 90% of the stock in SCAC was purchased by American Television Communications and Younts' 50% interest was reduced to 5%. On June 28, 1971, Younts exercised an option which increased his interest in SCAC from 5% to 15%.

5. Before January 15, 1971, Younts had been President of SCAC. He then became a Vice-President of the corporation. He has always been a director. Section II of FCC Form 301 requires principals to report all business interests "in which such party has now or within the past 5 years has had either a 25% or greater interest *or any official relationship*" (emphasis supplied). Younts should have reported his relationship and interest with SCAC when the Sandhill application was filed; he retained an "official relationship" although his ownership interest had been reduced to less than 25%. Until December 1966, Younts had an ownership interest in Rockingham-Hamlet Cablevision, Inc. Although his ownership interest was less than 25%, Younts was an officer and director of that corporation. Younts did not report his interest in the Rockingham-Hamlet corporation in his Sandhill application, which was filed within five years of December 1966.

6. On December 16, 1971, Younts was informed by his counsel that he should have reported his connection with SCAC. An amendment to the Sandhill application was tendered on that day, reflecting Younts' continued interest with SCAC and his former interest in Rockingham-Hamlet. On December 23, 1971, Gaston filed its petition to enlarge the issues, based, in part, on Sandhill's failure to reflect in its original application the continuing interest Younts had in SCAC.

7. Younts explained that he had misunderstood the directions in Section II of the application quoted above. He had believed that since his ownership interest had fallen below 25% after 1970, he need not report his SCAC interest or relationship in the application. He neglected to report his interest and relationship in Rockingham-Hamlet because his ownership interest was less than 25%.

8. The Sandhill application should have reflected that Younts' interest in SCAC did not terminate in 1970, but that he continued to have an ownership interest and was an officer and director of the CATV corporation. This information is not only called for by the application form itself, but is obviously relevant when the applicant is seeking to construct a radio station in the community for which the CATV system has a franchise. The application should also have shown that Younts had an interest in Rockingham-Hamlet Cablevision, Inc., and was an officer and director of that corporation until December 1966.

9. Younts, as already explained, lays the failure to show his continued interest in SCAC to his own misunderstanding of the directions in the application. There is no evidence to the contrary. It is also important to note that the corrective amendment was filed by Sandhill before the filing of the petition to enlarge. It can therefore be considered the uncoerced act of the applicant and not something reported in attempted exculpation only after the facts had been brought to the attention of the Commission by someone else.

10. Based on the above, it is concluded that Sandhill would not have been disqualified under the Rule 1.514(a) issue had it prosecuted its application, although it might have suffered a comparative demerit.

11. Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion, in accordance with Section 1.276 of the Rules, the remaining "character" issue is resolved in Sandhill's favor, and Sandhill may be reimbursed by Gaston in the sum of $8500, as provided in their dismissal agreement.

HERBERT SHARFMAN,

Administrative Law Judge,
Federal Communications Commission.

F.C.C. 72-92

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
SOCIALIST WORKER PARTY 1972, NEW YORK, N.Y.
Concerning Equal Opportunity Under Section 315 Re Metromedia, Inc.

OCTOBER 12, 1972.

Mr. LARRY SEIGLE, *National Campaign Manager, Socialist Workers Party 1972, Campaign Committee, 706 Broadway, 8th Floor, New York, N.Y.*

DEAR MR. SEIGLE: This is in response to your letters of August 5, 10 and 29, 1972 concerning various equal time requests for Socialist Workers Party Candidates.

In your correspondence you state that the then Democratic Party Vice Presidential candidate, Senator Thomas Eagleton, appeared on the "Merv Griffin Show" on July 27; that his appearance was a "use" under Section 315 of the Communications Act of 1934, as amended; and that Andrew Pulley, Vice Presidential candidate of the Socialist Workers Party requested equal time from Metromedia, Inc. within seven days of the first prior use. You note that subsequent to the application for equal time, Senator Eagleton withdrew as a candidate for Vice President. You state that Metromedia, Inc. denied Mr. Pulley's request for equal time because it believed that the withdrawal of Senator Eagleton made the request moot. In opposition to Metromedia's position you assert:

> It is clear that the claimant becomes entitled to equal opportunity at the time he submits his request, provided that all the criteria of Section 315 are met. Thus as of July 28, Mr. Pulley was entitled to equal time. How can this right be revoked, several days later by subsequent events? In theory, had Metromedia responded immediately to the request, Mr. Pulley could even had been granted his equal time before Senator Eagleton's withdrawal. The licensee's obligation to provide equal opportunity, already incurred, cannot be removed because of what subsequently happens to the candidate who appeared.

You declare that at the time Mr. Pulley asked for equal time the Socialist Workers Party had filed for ballot status in 15 states and been certified in six states; that the Socialist Workers Party has collected nearly 500,000 signatures on nominating petitions; that its candidates have toured the nation; that its campaign literature has been distributed nationwide; and that its campaign activities have been covered by the press and national radio and television networks. You state that Mr. Pulley has "established a *national* showing of a bona fide campaign, regardless of particular state laws." You conclude that he "should be entitled to equal time in all of the outlets that carried the July 27 Eagleton appearance." You further note that

dates for certifying candidates for the ballot vary widely from state to state and that in many states the deadline for filing nominating petitions is several months before the date on which final certifications are issued. You ask when candidates for President and Vice President, other than those of the two major parties, become subject to Section 315. You claim that the national showing by Mr. Pulley and the Socialists Workers Party of his bona fide candidacy should be enough to establish that he is a legally qualified candidate under Section 315.

In your correspondence you included articles which acknowledge that the Socialist Workers Party candidate for President, Ms. Linda Jenness, is 31 years old and the Vice Presidential candidate, Mr. Pulley, is 21 years old. You claim that despite the fact that both candidates fail to meet the presidential minimum constitutional age requirement of 35,[1] Ms. Jenness and Mr. Pulley are legally qualified candidates and should be granted equal time. You state that presidential elections are protected by the U.S. Constitution and cite *Oregon* v. *Mitchell*, 400 U.S. 112 (1971) to support your contention; that the Twentieth Amendment, Section 3 of the Constitution provides the procedure to be followed in the event of the election of a President or Vice President who is not qualified to take office; that the Twentieth Amendment gives Congress the power to provide by law for the case where neither the President nor Vice President has qualified before the time fixed for the beginning of their terms; that the Supremacy Clause, Article IV, Section 2 of the Constitution provides that the Constitution takes precedence over other state laws; that legislative history shows that the framers of the Twentieth Amendment foresaw the possible selection of a disqualified President-elect or Vice President-elect and decided to give people an opportunity to actually vote for persons ineligible to take office. You state:

> It is interesting to note that candidate Jenness comes within the terms of the last phase of Section 3, Amendment XX. The next presidential term will begin on January 20, 1973. (Amendment XX Section 1.) Linda Jenness will reach the age of 35 within the next presidential term. Thus, if she is elected, she will then qualify to take office on her thirty-fifth birthday. (Of course this assumes that no constitutional amendment is passed lowering the age requirement between her election and the beginning of the next presidential term. If such an even occurred she would then take office earlier than her thirty-fifth birthday.)

You further state:

> It is clear, therefore, that Constitutional Amendment, and subsequent Congressional action, has preempted this area and provided the course to follow should an underaged president be elected. The solution is left to Congress. Therefore, any attempt by the networks to deny Jenness or Pulley equal time on the grounds of their failure to meet the age limit set by the Constitution would be an impermissible infringement on their Constitutional rights.

In telephone conversations with members of the Commission's staff you stated these constitutional arguments are now pending before an Ohio court.

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[1] Article II, Section I, Clause 4 of the United States Constitution states that "No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained the Age of thirty-five years, and been fourteen years a resident within the United States." Further Article XII of the Constitution provides that ". . . no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States."

In further correspondence, you state that Ms. Jenness asked the National Broadcasting Company and the Mutual Broadcasting system for equal time to reply to those networks' broadcast of a speech made by Democratic Party nominee George McGovern on August 5, 1972; that NBC denied your request because Ms. Jenness is under 35 years of age and has not established that she is a legally qualified candidate for the presidency of the United States; and that Mutual Broadcasting System denied your request on the basis that the appearance of Senator McGovern was a news broadcast and exempt from the equal time regulation. In reply you state that "the decision of both networks infringe on Linda Jenness' right, as a bona fide candidate for the presidency of the United States, to equal time . . ."

In another matter involving a candidate of your party, you state that on April 26, 1972 Congressman Roman C. Pucinski, Democratic Party candidate for United States Senate from Illinois, appeared on station WTTW, Chicago; that Fred Halstead the Socialist Workers Party candidate for the same office asked WTTW for equal time; that Mr. Halstead is "in the process of complying with the state requirement to appear on the ballot"; and that the licensee of WTTW demanded a letter from the Secretary of State of Illinois declaring that Mr. Halstead was a legally qualified candidate as evidence of Mr. Halstead's bona fide status. You claim that the Secretary of State has no statutory authority nor is competent to rule on the bona fide character of a candidate: that his sole function in Illinois with regard to elections "is to order the placing on the ballot of those candidates who have met the requirements under state law"; that Illinois law did not allow Mr. Halstead to file his signatures until well after the appearance of Congressman Pucinski; that Mr. Halstead has collected 40,000 signatures and is carrying on a serious campaign; and that "If for any reason, he should be unsuccessful in his attempt to be listed on the ballot, he will run a vigorous write-in campaign." You further state:

> **If the Commission were to hold that a candidate who is in the process of getting on the ballot can only qualify for equal time after his certification by the Secretary of State, the Commission would be discriminating against those candidates who try to meet the ballot requirements, and in favor of those who content themselves with write-in campaigns, since a bona fide write-in candidate is eligible for equal time as soon as he launches his campaign.**
>
> **This would clearly be a denial of equal protection under the law.**

Section 315 of the Communications Act of 1934, as amended, states that if a licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he must afford "equal opportunities" to all other such candidates for that office in the use of such broadcasting station. If a legally qualified candidate appears on a bona fide newscast, bona fide news interview, bona fide documentary or on-the-spot coverage of a bona fide news event such an appearance will not be deemed a use of a broadcasting station for the purposes of Section 315.

Regarding the complaints of Linda Jennes and Andrew Pulley against Metromedia, Inc., National Broadcasting Company and Mutual Broadcasting System, you claim that despite the fact that both are under the minimum age of 35 as set by the Constitution in order to

be eligible as President and Vice-President they should for various reasons be considered to be legally qualified candidates. The Commission has repeatedly stated that a legally qualified candidate must be determined by reference to the law of the state in which the election is being held. In general a candidate is legally qualified under Section 315 if he can be voted for in the state or district in which the election is being held, and, if elected, is eligible to serve in the office in question. See *Use of Broadcast Facilities by Candidates for Public Office*, 35 Fed. Reg. 159, Public Notice of August 7, 1970, Section IV, Question and Answer number 1. The Commission agrees that the Twentieth Amendment provides the procedure to be followed in the event of the election of a president or vice president who is not qualified to take office. However, neither the legislative history which you cite nor the logical thrust of the Twentieth Amendment give us reason to overturn our interpretation of who is a legally qualified candidate for purposes of Section 315. It is clear from the facts before us that Ms. Jennes and Mr. Pulley if elected, would not be eligible to serve as President or Vice President because they do not meet the minimum age requirement of 35 as set by the Constitution. Therefore they cannot be considered legally qualified candidates for the offices of President and Vice President and Metromedia, Inc., National Broadcasting Company and Mutual Broadcasting System need not provide them with "equal opportunities" to reply to Senator Eagleton and Senator McGovern. The additional issues concerning Senator Eagleton's appearance and related to these complaints are moot unless Ms. Jenness and Mr. Pulley are legally qualified candidates, and it is unnecessary for the Commission to reach a decision on these issues.

In connection with your complaint regarding Fred Halstead, candidate for U.S. Senate from Illinois, you ask when third-party candidates for state office become eligible for equal time. The Commission does not differentiate between major party candidates and candidates of other parties. Any candidate who complies with the law of the state in which the election is being held is generally considered to be a legally qualified candidate. In addition Section 73.657(a) of the Commission's Rules defines a legally qualified candidate as:

> . . . any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:
>
> (1) Has qualified for a place on the ballot or
>
> (2) Is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be.

Section 73.657(f) also provides that a "candidate requesting . . . equal opportunities of the licensee, or complaining of noncompliance to the Commission shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office."

It is clear in this case that Mr. Halstead decided to get on the Illinois ballot via the petition method. It appears from the facts before

us that at the time of Congressman Pucinski's appearance and even at the time of this complaint more than three months later, Mr. Halstead's petitions still had not been certified nor his name officially placed on the ballot in Illinois.[2] Therefore, there is no basis for stating that he is a legally qualified candidate under the petition method until he is certified as such by the Illinois Secretary of State. See *Use of Broadcast Facilities by Candidates for Public Office, supra.* You state that Mr. Halstead will seek to become a write-in candidate for Senator if he is unsuccessful in his attempt to be placed on the ballot via the petition method. However, it is clear that as of the time of Congressman Pucinski's appearance on WTTW, and indeed for a considerable time thereafter, he had not attempted to become a write-in candidate and could not be considered a legally qualified candidate via the write-in method. At such time that Mr. Halstead chooses to conduct a write-in campaign, the question as to whether he is a bona fide write-in candidate and therefore legally qualified under the provisions of Section 73.657(a) and (f) will then be decided if a Commission determination becomes necessary at that time. (cf. *Anthony L. Bruno*, 26 FCC 2d 656 (1970)). In any event, it appears that Mr. Halstead was not a legally qualified candidate at the time of Representative Pucinski's appearance and therefore was not entitled to equal opportunities in connection with his April 26 appearance.

Commissioner Johnson dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

In its letter to Mr. Larry Seigle (National Campaign Manager for the Socialist Workers Party), the Commission majority plunges headlong into the decision of issues which would give our greataest jurists considerable pause. The question of who is or is not a "legally qualified candidate" for national office is far more complex than is indicated by the majority's shallow analysis.

Linda Jenness and Andrew Pulley are said to be the duly nominated candidates for President and Vice President of the Socialist Workers Party. As such, they are entitled to opportunities for access to the airwaves equal to those of their opponents, under Section 315 of the Communications Act of 1934, unless and until the Supreme Court has decided otherwise or until Congress has altered the Section.

Vice Presidential candidate Andrew Pulley requested equal time from Metromedia, Inc., following a July 27, 1972 appearance by then-Democratic Vice Presidential candidate Thomas Eagleton on the Merv Griffin Show. Metromedia refused, using only the argument that it believed that the withdrawal of Senator Eagleton made the request moot. Candidate Linda Jenness requested equal time from NBC and the Mutual Broadcasting System in order to reply to a speech made by

[2] In a telephone conversation on September 13, 1972 between you and a member of the Commission's staff you stated that Mr. Halstead's only basis for claiming that he was a legally qualified candidate to Station WTTW was that he was attempting to get on the ballot in Illinois via the petition method. You also state that Mr. Halstead is only conducting a petition drive and has not attempted to become a write-in candidate and will not attempt to become a write-in candidate unless he fails in his petition drive.

Democratic Party nominee George McGovern on August 5, 1972. While Mutual denied the request on the basis that the appearance of Senator McGovern was a news broadcast, NBC chose to deny the request because Ms. Jenness was under 35 years of age. The Commission has decided these two cases solely on its own interpretation of who is, or is not, a "legally qualified candidate." If Ms. Jenness and Mr. Pulley are not "legally qualified candidates," so the argument goes, none of the other issues need be reached. The Commission's rules include in the definition of "legally qualified candidate" the criteria that the candidate must met "the qualifications prescribed by the applicable laws to hold the office for which he is a candidate." The majority holds that both candidates, because they are too young to hold the office for which they are running are, therefore, not legal candidates for office.

The majority's mistake is in the slipshod application of its own *procedural* rules and "guidelines" in such a manner as to give them *substantive* validity. The majority states that "Any candidate who complies with the law of the state in which the election is being held is *generally* considered to be a legally qualified candidate." [emphasis added] In addition, the majority purports to define a "legally qualified candidate" within the context of its Rules.

I had always been under the impression that the U.S. Constitution took precedence over the Rules of the Federal Communications Commission. That Constitution gives the requirements for *holding* the two highest offices in this country. See Article 2, Section 1, Clause 4. It most certainly does not delineate the requirements for *candidates* to those offices, and moreover provides, in Amendment XX, Section 3, for the eventuality of the election of a President or Vice President not eligible otherwise to serve:

> If a President shall not have been chosen before the time fixed for the beginning of his term, *or if the President elect shall have failed to qualify*, then the Vice President elect shall act as President until a President shall have qualified; and Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified . . .

[emphasis added] I can find no other implication in the words of this Amendment than that the right of Ms. Jenness and Mr. Pulley to run for President and Vice President *and even to be elected to those offices* is a constitutionally protected one, regardless of the nature of their inability to serve.

In the case of 31-year-old Ms. Jenness, I need only reiterate petitioner's point that one need look no further than the Constitution to discover the procedure whereby she would be entitled to inauguration as President the moment she reaches her 35th birthday. Thus, the presumption made by the majority that "It is clear from the facts before us that Ms. Jenness and Mr. Pulley, if elected, would not be eligible to serve as President or Vice President . . ." does not, as it would insist, so simplistically lead to the assumption that the Socialist Worker Party candidates should be denied their legal rights as *candidates.*

The majority's action regarding Socialist Worker Party, U.S. Senate candidate Fred Halstead is, if anything, even less excusable than its resolution of the more complicated intellectual issues confronting Jenness and Pulley. I can find no justification for this denial even

within the context of a proper application of the Commission's Rules.

Mr. Halstead requested equal time from station WTTW, Chicago, after an appearance on April 26, 1972 by Congressman Roman C. Pucinski, the Democratic nominee for the U.S. Senate. The licensee of WTTW demanded a letter from the Secretary of State of Illinois declaring that Mr. Halstead was a "legally qualified candidate." However, petitioner submits that the Secretary of State has no statutory authority to rule on the *bona fide* character of a candidate, but only to certify the candidate onto the state ballot once he has submitted a sufficient number of nominating petitions. Moreover, Illinois law did not even *allow* Mr. Halstead to file his petitions until well after the appearance by Mr. Pucinski. The station, however, refused to grant Mr. Halstead the time, and the Commission has now upheld that refusal with what is at best a tortured misreading of its own Rules and definitions.

The Commission's Rules define a "legally qualified candidate" as one who either "(1) Has qualified for a place on the ballot or (2) *Is eligible under the applicable law* to be voted upon by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party. . . ." § 73.657(a). [emphasis added]

The fact that Mr. Halstead is attempting to pursue the longer, more arduous process of getting his name on the ballot in Illinois by nominating petitions by no means renders him "ineligible" under Illinois law to be a write-in candidate. Yet this Commission has placed itself in the absurd position of penalizing Mr. Halstead, the "duly nominated" candidate of his party, for pursuing the former, even though he has expressed every intent of falling back on the status of "write-in" candidate should his petition drive fail. This decision, in effect, serves to deprive all minority or fringe party candidates of their not inconsiderable rights under Section 315 of the Communications Act for attempting to use other, equally precious, rights guaranteed them under our system of democracy.

F.C.C. 73-77

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re SEMINOLE CABLEVISION, INC., CASSELBERRY, FLA. SEMINOLE CABLEVISION, INC., WINTER SPRINGS, FLA. For Certificates of Compliance	CAC-140 FL 191 CAC-141 FL 190

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, H. REX LEE AND REID CONCURRING IN THE RESULT. COMMISSIONER JOHNSON ABSENT.

1. On April 6, 1972, Seminole Cablevision, Inc., filed applications for certificates of compliance for new cable television systems to operate at Casselberry, Florida, and North Orlando (now Winter Springs), Florida, both of which are located within the specified zones of the Orlando-Daytona Beach, Florida market (the 55th largest), and each of which will operate from the same head end. Each system proposes to provide the following Florida television signals to subscribers: WDBO-TV(CBS), WMFE-TV(Educ.) and WFTV (ABC), Orlando; WESH-TV(NBC), Daytona Beach; WUFT (Educ.), Gainesville; WEDU(Educ.), WUSF-TV(Educ.), and WTOG-TV(Ind.), Tampa; and WLTV (Spanish language) and WCIX(Ind.), Miami.[1] Public Notice of these applications was given April 26, 1972. And on May 15, 1972, the licensee of Station WMFE-TV, Orlando, Florida, filed a "Petition of Florida Central East Coast Educational Television, Inc." with respect to these applications.

2. On January 19, 1972, Seminole requested waiver of former Section 74.1107(a) of the Commission's Rules to allow it to carry the distant signals of WUFT, WEDU, and WUSF-TV on its proposed systems at Casselberry and North Orlando (Winter Springs). In the absence of objection of any sort, on February 28, 1972, the Chief, Cable Television Bureau, acting pursuant to authority delegated in Section 0.289(c)(12) of the Rules, granted Seminole's request. Notwithstanding this history, Florida Central urges that we refuse to authorize Seminole to carry the distant in-state signals on its proposed systems. In support of its request, Florida Central argues (a) that importation of distant educational signals will adversely effect its economic viability, (b) that earlier personnel of the station did not recognize the importance of distant signals; and (c) that the systems

[1] A construction permit is outstanding for WSWB-TV, Orlando, and Seminole wishes to carry it when it begins operation.

here proposed are within WMFE–TV's "sphere of influence." With respect to (c), on May 1, 1972, the managers of Educational Stations WEDU–TV, Tampa; WJCT, Jacksonville; WUFT, Gainesville; and WMFE–TV, signed a joint agreement recognizing WMFE–TV's sphere of influence and stating that "we wish to express our desire that the other noncommercial signals being imported by CATV systems in the WMFE–TV sphere of influence be removed."

3. We rule on Florida Central's objections as follows: (a) (b) The allegations of possible impact are broad and only generally supported; nonetheless, it is not unlikely that they could prevail in the absence of countervailing considerations. Compare par. 94–95, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 180, and *Norristown Distribution Systems, Inc.*, FCC 72–1095, ——— FCC 2d ———. Such considerations seem present here in Florida Central's earlier failure to object to Seminole's proposals which have led both Seminole and the Commission to consider the question of distant educational signals on Seminole's systems to be settled. While we recognize that educators may be pressed for finances or facilities to object fully to cable proposals, we do not believe that complete silence should be overlooked or that we should act to disturb this situation where the signals involved are clearly grandfathered, and (c) we are not persuaded of any public interest requires that we recognize a "sphere of influence" for WMFE–TV which should prevent importation of in-state educational stations. See *Information Transfer, Inc.*, FCC 72–1094, ——— FCC 2d ———. In addition to these matters, we note *sua sponte* that Seminole's franchises [2] are not fully consistent with Section 76.31 of the Rules (for example, both contain franchise fees of at least 7%). Nonetheless, our review of the franchises satisfies us that they are in substantial compliance with our rules sufficient to justify a grant until March 31, 1977. E.g., *CATV of Rockford, Inc.*, FCC 72–1005, ——— FCC 2d ———.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition of Florida East Coast Educational Television, Inc." filed May 15, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–140, CAC–141) ARE GRANTED and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] The Casselberry franchise was granted December 20, 1971, and the Winter Springs franchise was granted November 1, 1971.

109–025—73——7

F.C.C. 73–78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re SEMINOLE CABLEVISION, INC., SANFORD, FLA. For Certificate of Compliance	CAC–77 FL188

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, H. REX LEE AND REID CONCURRING IN THE RESULT. COMMISSIONER JOHNSON ABSENT.

1. On April 6, 1972, Seminole Cablevision, Inc., filed an application (CAC–77) for certificate of compliance for a new cable television system to operate at Sanford, Florida, which is located within the specified zones of the Orlando-Daytona Beach, Florida market (the 55th largest). The system proposes to provide the following Florida television signals to subscribers: WDBO–TV (CBS), WMFE–TV (Educ.), and WFTV (ABC), Orlando; WESH–TV (NBC), Daytona Beach; WUFT (Educ.), Gainesville; WEDU (Educ.), WUSF–TV (Educ.) and WTOG–TV (Ind.), Tampa; and WLTV (Spanish language) and WCIX (Ind.), Miami.[1] Public notice of this application was given April 12, 1972. And on May 15, 1972, the licensee of Station WMFE–TV, Orlando, Florida, filed a "Petition of Florida Central East Coast Educational Television, Inc." with respect to this application.

2. On May 19, 1971, Seminole requested waiver of (former) Section 74.1107 of the Commission's Rules to allow it to carry the distant signals of WUFT, WEDU, and WUSF–TV on its proposed system at Sanford, Florida. In the absence of objection of any sort, on September 16, 1971, the Chief, Cable Television Bureau, acting pursuant to authority delegated in Section 0.289(c)(12) of the Rules, granted Seminole's request. Notwithstanding this history, Florida Central urges that we refuse to authorize Seminole to carry the distant in-state signals on its proposed systems. In support of its request, Florida Central argues (a) that importation of distant educational signals will adversely affect its economic viability, (b) that earlier personnel of the station did not recognize the importance of distant signals; and (c) that the system here proposed is within WMFE–TV's "sphere of influence". With respect to (c), on May 1, 1972, the managers of Educational Stations WEDU–TV, Tampa; WJCT, Jacksonville; WUFT, Gainesville; and WMFE–TV, signed a joint agreement recognizing WMFE–TV's sphere of influence and stating that "we wish to express our desire that the other noncommercial signals being imported by CATV systems in the WMFE–TV sphere of influence be removed."

[1] A construction permit is outstanding for WSWB–TV, Orlando, and Seminole wishes to carry it when it begins operation.

3. We rule on Florida Central's objections as follows: (a) (b) The allegations of possible impact are broad and only generally supported; nonetheless, it is not unlikely that they could prevail in the absence of countervailing considerations. Compare par. 94–95, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d, 143, 180, and *Norristown Distribution Systems, Inc.*, FCC 72–1095, ——— FCC 2d ———. Such considerations seem present here in Florida Central's earlier failure to object to Seminole's proposal which have led both Seminole and the Commission to consider the question of distant educational signals on Seminole's system to be settled. While we recognize that educators may be pressed for finances or facilities to object fully to cable proposals, we do not believe that complete silence should be overlooked or that we should act to disturb this situation where the signals involved are clearly grandfathered, and (c) we are not persuaded of any public interest which requires that we recognize a "sphere of influence" for WMFE–TV which should prevent importation of in-state educational stations. See *Information Transfer, Inc.*, FCC 72–1094, ——— FCC 2d ———. In addition to these matters, we note *sua sponte* that Seminole's franchise [2] is not fully consistent with Section 76.31 of the Rules (for example, a franchise fee of at least 7%). Nonetheless, our review of the franchise satisfies us that it is in substantial compliance with our rules sufficient to justify a grant until March 31, 1977. *E.g.*, *CATV of Rockford, Inc.*, FCC 72–1005, ——— FCC 2d ———.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition of Florida East Coast Educational Television, Inc." filed May 15, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–77) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] The franchise was granted September 14, 1970.

F.C.C. 72–1199

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
SANDRA STARK, HAMDEN, CONN.
For Waiver of Fee

DECEMBER 22, 1972.

Mrs. SANDRA STARK,
14 Briar Lane,
Hamden, Conn.

DEAR MRS. STARK: With respect to your letter dated June 15, 1972, to this Commission, your communication with the United States Commission on Civil Rights and the Women's Bureau of the United States Department of Labor, this is to advise you that this Commission has today waived its rules requiring payment of an $8.00 fee for the reissuance of your restricted radiotelephone operator permit in your married name. You should receive the new permit shortly.

At the time your letter arrived the whole question of operator permits among other matters was under review by the Commission in connection with its proposed revision of its Schedule of Fees.

The Commission's proposed rule making, just released, proposes to eliminate the fee for permit replacement when the reason for the requested replacement is name-change only.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of STERLING COMMUNICATIONS, INC. For Construction Permits in the Cable Television Relay Service	CPCAR–407 CPCAR–408 CPCAR–409

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON ABSENT.

1. The captioned applications, filed by Sterling Communications, Incorporated, involve a one channel, three hop microwave communication facility applied for in the Cable Television Relay Service (Part 78 of the Commission's Rules). The three stations applied for would be used by Sterling Communications, Incorporated to relay what is described as a "diversified program service consisting of feature films and sporting events" from an origination point in New York City to an interconnection point with Eastern Microwave, Inc. at Highland Lakes, New Jersey. Sterling Communications already distributes this programming to cable television systems which it owns in New York City and on Long Island. It now proposes to distribute the programming to unaffiliated systems over the facilities applied for and through interconnection with facilities of Eastern Microwave and New York Penn Microwave.

2. A petition to deny these applications has been filed by the National Association of Theatre Owners, Inc. (NATO). NATO is an organization representing motion picture theatre owners throughout the United States. It alleges generally that what Sterling is proposing is the "creation of a massive, multi-state, interconnected CATV pay TV network," that this network will compete with theatres for audience, revenues, and film product, and that this will seriously and adversely affect the economic well being of the motion picture theatres in the area. The result will be the "ruination of the motion picture theatre industry." This in-turn, it is said, will have an adverse affect on America's cities because motion picture theatres provide the magnet that attracts people to the downtown or other areas in which theatres are located. NATO also raises questions as to whether, if this network can outbid motion picture theatres for films, it cannot also outbid "other exhibition outlets with respect to their entertainment forms, such as legitimate theatres, concerts, operas, and sporting events." In light of this, NATO requests that the Commission not act on these applications until it has resolved these issues in its pending proceeding in Docket 19554.[1]

[1] *Notice of Proposed Rule Making Memorandum Opinion and Order in Docket 19554*, 35 FCC 2d 893 (1972).

3. In addition to the opposition to these applications, questions are also raised with respect to them because Sterling Communication proposes service to unaffiliated cable television systems. Section 78.13 of the rules specifies that authorizations in the Cable Television Relay service may only be granted to cable television system operators or to cooperative enterprises wholly owned by cable television system owners or operators. To the extent that this provision of the rules would prevent Sterling Communication from rendering the service proposed, a waiver of the rules is requested. Sterling indicates that the Eastern Microwave, with which its facilities will interconnect, does not consider it feasible to extend its service into New York City because of difficulties involved in finding frequency spectrum for new facilities in the New York City-Northern New Jersey area.

4. Two questions are present by these applications—whether Sterling should be granted a waiver to serve unaffiliated customers using frequencies in the Cable Television Relay Service and whether, in response to NATO's opposition, action should be deferred until the completion of our proceedings in Docket 19554. First, with respect to NATO's opposition, we cannot agree that action on these applications should be further delayed. We have concluded in a long series of decisions that the distribution of non-broadcast programming by cable television systems, subject to appropriate regulation, is in the public interest.[2] We have encouraged system interconnection for distribution of this programming, have authorized the use of microwave radio stations for the relay of non-broadcast programming, and have opposed proposals that would have restricted the interconnection of systems.[3] Our recently adopted rules were designed to encourage the origination and distribution of nonbroadcast programming by cable television system operators and by others. It has been our judgment that, subject to appropriate regulation, the distribution of origination programming, including that for which there is a per channel or per program charge, could significantly increase the quality and diversity of programming available to the American public.

5. NATO's petition provides us no basis on which to conclude that our judgment was wrong or that the rules now in effect should be more restrictive. Although general allegations are made as to how the motion picture theatre industry will suffer from a grant of these applications, no specific facts are adduced as to which theatre in particular will suffer, much less how the public on whose behalf we regulate, would be harmed by a grant of the applications in question. NATO requests rather a stay of processing and decision on these applications until a decision has been reached in Docket 19554 as to what changes, if any, should be made in the existing rules. We see no reason to withold action for this reason. In rendering the service in question Sterling Communications will be doing something that the Commission has actively encouraged and that will have to be fully in compliance with the rules. We have been attempting to expedite completion of our proceeding

[2] See for example *Midwest Television, Inc.*, 13 FCC 2d 478 (1968); *First Report and Order in Docket 18397*, 20 FCC 2d 201 (1969); *Memorandum Opinion and Order in Docket 18397*, 23 FCC 2d 825 (1970). See also *U.S.* v. *Midwest Video Corporation*, ——— U.S. ——— (Case No. 71–506) June 7, 1972.

[3] *Report and Order in Docket 17999*, 20 FCC 2d 422 (1969); *First Report and Order in Docket 18397*, 20 FCC 2d 201, para. 7 (1969).

in Docket 19554 and anticipate that a decision will be reached in that matter without undue delay. Whatever rules result from that proceeding will be fully applicable to the programming distributed by Sterling and the risk of any change in the rules is one which Sterling must bear. NATO asks that we not consider the questions involved on an *ad hoc* basis and we agree, but think the logic of that position requires not that action on these applications be delayed but that we continue to consider the questions raised in Docket 19554. We believe this is an especially appropriate manner in which to proceed when the question is not one as to character, technical, financial or other qualifications of the applicant, nor a question as to the technical sufficiency of the proposal or a possible change in such requirements but a possible limitation on the content of the communication which will be relayed. In such an instance there is a heavy burden that must be met to overcome the presumption in favor of free and open communications.

6. Additionally, we believe this is an appropriate case in which to grant a limited waiver of the rules to the extent that they would otherwise prohibit Sterling from providing service to unaffiliated cable television systems. The Cable Television Relay Service was established for the purpose of aiding cable television systems to obtain program material and the service proposed here is consistent with that objective. And in addition it appears that the absence of reasonably available alternative relay methods weighs heavily in favor of the requested waiver.

7. In so acting, however, we acknowledge that this waiver gives Sterling sole control over a communications link out of the City of New York of a kind that would not necessarily be available to other similar program suppliers. We are concerned that our action not tend to give Sterling a monopoly over service of this type and are, accordingly, taking this action on condition that Sterling accept such time and cost sharing obligations with other cable television system program suppliers as may be necessitated by their inability to obtain facilities such as those here authorized to Sterling Communications. Sterling's failure to respond to reasonable sharing requests, as discussed above, would be grounds for termination of the waiver and consequently the Cable Television Relay Station authorizations.

Accordingly, IT IS ORDERED, That the "Petition to Deny" filed August 16, 1972, by the National Association of Theatre Owners, Inc. IS DENIED.

IT IS FURTHER ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, and Section 78.1, *et seq.*, of the Commission's Rules that the above-captioned applications ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1101

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Notice to
LESTER F. SUHLER, CROSS RIVER, N.Y.
To Appear Before the Presiding Officer
in Answer to a Subpena

DECEMBER 6, 1972.

CERTIFIED MAIL

MR. LESTER F. SUHLER,
Jonah's Lane,
Cross River, N.Y.

Re: Cowles Florida Broadcasting, Inc., Docket No. 19168 et al.

DEAR MR. SUHLER: You are hereby informed that pursuant to the ruling of the Presiding Officer in the above-referenced proceeding denying the petition of Lester F. Suhler to quash a subpoena lawfully issued to you, you are HEREBY COMMANDED to appear before the said Presiding Officer at such time and place as he may designate and to testify in the instant proceeding regarding all matters deemed relevant by the Presiding Officer, or to file an appeal from said ruling of the Presiding Officer. Such appeal must be filed with the Review Board within ten days from receipt of this letter in accordance with the procedures prescribed for the filing of such appeals set out in Section 1.301(c) of the Commission's rules, 47 CFR § 1.301(c).

Chairman Burch was absent; Commissioner Reid concurred in the result.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re SUN VALLEY CABLE COMMUNICATIONS, SUN CITY, A SUBDIVISION OF MARICOPA COUNTY, ARIZ. For Certificate of Compliance	CAC–1128 AZ 040

MEMORANDUM OPINION AND ORDER

(Adopted January 4, 1973; Released January 10, 1973)

BY THE COMMISSION: CHAIRMAN BURCH NOT PARTICIPATING; COMMISSIONER H. REX LEE CONCURRING.

1. On August 28, 1972, Sun Valley Cable Communications filed a "Petition for Special Relief" in which it requests a partial waiver of Section 76.31 of the Commission's Rules, and an "Application for Certificate of Compliance" (CAC–1128) in which it requests authority to operate a 30 channel cable television system at Sun City, a subdivision of Maricopa County, Arizona (which is located in the 43rd television market), on which it proposes to offer approximately 27,400 persons the following television signals: KAET (Educ.), KOOL–TV (CBS), KPAZ–TV (Ind.), KPHO–TV (Ind.), and KTVK–TV (ABC), KTAR–TV (NBC), all Phoenix, Arizona; and KTLA (Ind.), and KTTV (Ind.), both Los Angeles, California. On October 30, 1972, KOOL Radio-Television Inc., licensee of Station KOOL–TV, Phoenix, Arizona, filed a letter opposing Sun Valley's proposal, and Arizona Television Company, Inc., licensee of Station KTVK–TV, Phoenix, Arizona, filed both an "Objection to Certification" and an "Opposition to Petition for Special Relief" directed against Sun Valley.

2. On September 8, 1970, Maricopa County granted Sun Valley non-exclusive authority to use county rights-of-way for the installation of a cable television system, but the County Board of Supervisors does not believe that it has "authority whatsoever to in any way regulate the operations, rates or other business of community antenna television systems within this county." In these circumstances, Sun Valley has filed for special relief pursuant to Section 76.7 of the Rules in an effort to qualify under Par. 116, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 366, which provides for case by case consideration where it is claimed that there is no franchise or other appropriate authorization available for the cable operator to submit in his application for a certificate of compliance. In such cases, the applicant is expected to make an acceptable alternative proposal for assuring that the substance of our rules, and specifically Section 76.31, is complied with. In its "Petition for Special Relief," Sun Valley agrees to operate as follows: as a minimum, it will complete

at least twenty percent of the basic trunk line within the first year, and, thereafter, will equitably and reasonably extend energized trunk cable to a minimum of twenty percent of its franchise area each year and will extend energized trunk cable to new developments within Sun City as homes are built; it will apply for a new certificate of compliance within fifteen years of September 8, 1970; its rates—and any later increases in rates—will be published at least thirty days before they become effective, and will be based upon industry standards and the revenue requirements of the system; it will maintain an office and an agent in Sun City for the purpose of receiving and resolving complaints, and will maintain a record of complaints and the disposition thereof; and it will amend its operations and its commitments to the Commission to conform to any modifications of the Commission's franchise standards within one year of adoption by the Commission or at the time it files an application for a new certificate of compliance, whichever occurs first.

3. In opposing the special relief request, Arizona Television objects to Sun Valley's right-of-way authorization on the grounds: (a) that it does not indicate that Sun Valley's qualifications were approved by the franchising authority as part of a full public proceeding affording due process; (b) that it does not contain a construction time table; (c) that it does not contain a limit on the franchise period; (d) that it does not contain provisions for approving or modifying subscriber rates; and (e) that it makes no provisions for complaints. We rule on these objections as follows: (a) it appears that Sun Valley's' right-of-way was granted only after a public meeting of the Board of Supervisors; that at least one other party has been issued a non-exclusive right-of-way; and that neither Arizona Television nor KOOL[1] affirmatively allege any shortcomings on Sun Valley's part. In these circumstances, we believe there has been substantial compliance with our rules sufficient to justify a grant of a certificate until March 31, 1977. E.g. *CATV of Rockford, Inc.*, FCC 72-1005, —— FCC 2d ——; (b)-(e). These matters were dealt with in Sun Valley's petition, as described in par. 2 above, and we accept the undertakings there set forth as adequate to satisfy our requirements. Compare *LVO Cable of Shreveport-Bossier City*, FCC 72-954, —— FCC 2d ——. Arizona Television makes virtually identical objections to Sun Valley's certification application, and we reject them for the same reasons. It is appropriate to note that this is obviously a difficult area, and one which will require further consideration in our overall proceedings. We believe that we should not "freeze" cable development in localities where a supervising governmental entity is not now present, but rather should examine the applicant and its representations to determine whether on balance permission to proceed would serve the public interest. We have done so here, and find that a grant is appropriate. That grant is made subject to compliance with any further conditions imposed by the Commission during the period until March 31, 1977, which may result (i) from our overall proceedings to deal with this

[1] KOOL's letter objection is basically a quibble regarding the adequacy of the support for the claims that Maricopa County does not believe it can issue a franchise. We consider that the objection was disposed of by a letter dated November 9, 1972, signed by the Chairman of the Board of Supervisors, which confirms Sun Valley's earlier claims.

possible regulatory lacuna, or (ii) from further orders specifically directed to this case in event of facts being brought to our attention warranting action to protect the public interest. In any event, in 1977 we shall have the opportunity to review the matter, and may require special showings in these situations, if there has been no local regulatory change.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the letter objection filed October 30, 1972, by KOOL Radio-Television Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Certification" and "Opposition to Petition for Special Relief" filed October 30, 1972, by Arizona Television Company, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the "Petition for Special Relief" and the "Application for Certificate of Compliance" (CAC–1128) filed August 28, 1972, by Sun Valley Cable Communications ARE GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re TRI-CITIES CABLE CO., INC., LONE STAR, TEX. For Certificate of Compliance	CAC-797 TX245

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. On June 30, 1972, Tri-Cities Cable Company, Inc. filed an application for certificate of compliance for a new cable television system at Lone Star, Texas. The proposed system is to carry the following television signals:

KSLA-TV (CBS) Shreveport, Louisiana
KTBS-TV (ABC) Shreveport, Louisiana
KTAL-TV (NBC) Texarkana, Texas
KLTV (ABC, NBC) Tyler, Texas
KDTV (Ind.) Dallas, Texas
KDFW-TV (CBS) Dallas, Texas
WFAA-TV (ABC) Dallas, Texas
WBAP-TV (NBC), Ft. Forth, Texas
KTVT (Ind.) Ft. Worth, Texas
KERA-TV (Educ.) Dallas, Texas

This application is opposed by KTBS-TV Inc., licensee of Station KTBS-TV and by KSLA-TV, Inc., licensee of Station KSLA-TV, and Tri-Cities has replied.

2. Lone Star is located outside all television markets and accordingly its proposed signal carriage is consistent with Section 76.57 of the Commission's Rules. In their oppositions, KTBS and KSLA argue that Tri-Cities' franchise for Lone Star is inconsistent with Section 76.31 of the Rules in the following respects: (a) it does not state that the franchisee's legal character, financial, technical and other qualifications, and the feasibility of its construction arrangements have been approved by the franchising authority as part of a full public proceeding affording due process, (b) it does not contain a construction timetable, (c) it does not specifically refer to maintaining a local business office to handle complaints, (d) its duration is 25 years, which exceeds the 15 year maximum, (e) the franchise fee of 2% of annual gross receipts within the corporate limits of the city to be served, plus 2% of the annual gross receipts outside of the corporate limits of the city to be served may cumulatively exceed the Commission's suggested 3% franchise fee and as such require a special showing. But no showing has been attempted.

3. We rule on these objections as follows: (a) Tri-Cities has supplied information to establish that the franchise was issued only after a public proceeding, (b) in its application, Tri-Cities has undertaken to comply with the construction schedule of Section 76.31(a)(2) of the Rules, (c) in its application Tri-Cities has undertaken to maintain a local office in compliance with Section 76.31(a)(5) of the Rules, (d) Tri-Cities states that it will return to the city at the end of 15 years for franchise renewal proceedings. We find this offer to be acceptable, and therefore proceed on the understanding that Tri-Cities will voluntarily seek franchise renewal by November 9, 1985, *LVO Cable of Shreveport Bossier City*, FCC 72–954, ——— FCC 2d ———, (e) the discrepancy in the franchise fee is not so great as to bar the franchise (granted November 9, 1970) from being approved as in "substantial compliance" within the meaning of paragraph 115, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 366, see, *CATV of Rockford, Inc.*, FCC 72–1005, ——— FCC 2d ———. In summary, our review of Tri-Cities' franchise for Lone Star persuades us that it is in substantial compliance with our rules and policies sufficient to warrant a grant until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the subject application would be consistent with the public interest.

Accordingly IT IS ORDERED, That the "Opposition to Application for Certification" filed August 21, 1972, by KTBS–TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certification" filed August 21, 1972, by KSLA–TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That Tri-Cities Cable Company, Inc,'s application for Lone Star, Texas (CAC–797) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re TRI-CITIES CABLE CO., INC., DAINGERFIELD, TEX. For Certificate of Compliance	CAC-796 TX244

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. On June 30, 1972, Tri-Cities Cable Company, Inc. filed an application for certificate of compliance for a new cable television system at Daingerfield, Texas. The proposed system is to carry the following television signals:

KSLA-TV	(CBS)	Shreveport, Louisiana
KTBS-TV	(ABC)	Shreveport, Louisiana
KTAL-TV	(NBC)	Texarkana, Texas
KLTV	(ABC, NBC)	Tyler, Texas
KDTV	(Ind.)	Dallas, Texas
KDFW-TV	(CBS)	Dallas, Texas
WFAA-TV	(ABC)	Dallas, Texas
WBAP-TV	(NBC)	Ft. Worth, Texas
KTVT	(Ind.)	Ft. Worth, Texas
KERA-TV	(Educ.)	Dallas, Texas

This application is opposed by KTBS-TV, Inc., licensee of Station KTBS-TV, and by KSLA-TV, Inc., licensee of Station KSLA-TV, and Tri-Cities has replied.

2. Daingerfield is located outside all television markets and accordingly its proposed signal carriage is consistent with Section 76.57 of the Commission's Rules. In their oppositions KTBS and KSLA argue that Tri-Cities' franchise for Daingerfield is inconsistent with the franchise standards of Section 76.31 of the Rules in the following respects: (a) it does not state that the franchisee's legal character, financial, technical and other qualifications, and the feasibility of its construction arrangements have been approved by the franchising authority as part of a full public proceeding affording due process, (b) it does not contain a construction timetable, (c) it does not specifically refer to maintaining a local business office to handle complaints, (d) its duration is 25 years, which exceeds the 15 year maximum, (e) the franchise fee of 2% of annual gross receipts within the corporate limits of the city to be served plus 2% of the annual gross receipts outside of the corporate limits of the city to be served may cumulatively ex-

ceed the Commission's suggested 3% franchise fee and as such require a special showing. But no showing has been attempted.

3. We rule on these objections as follows: (a) Tri-Cities has supplied information to establish that the franchise was issued only after a public proceeding, (b) in its application, Tri-Cities has undertaken to comply with the construction schedule of Section 76.31(a)(2) of the Rules, (c) in its application, Tri-Cities has undertaken to maintain a local office in compliance with Section 76.31(a)(5) of the Rules, (d) Tri-Cities states that it will return to the city at the end of 15 years for franchise renewal proceedings. We find the offer to be acceptable, and therefore proceed on the understanding that Tri-Cities will voluntarily seek franchise renewal by November 9, 1985 *LVO Cable of Shreveport-Bossier City*, FCC 72–954, ——— FCC 2d ———. (e) The discrepancy in the franchise fee is not so great as to bar the franchise (granted November 9, 1970) from being approved as in "substantial compliance" within the meaning of paragraph 115, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36FCC2d 326, 366; see, *CATV of Rockford, Inc.*, FCC 72–1005, ——— FCC2d———. In summary, our review of Tri-Cities' franchise for Daingerfield persuades us that it is in substantial compliance with our rules and policies sufficient to warrant a grant until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the subject application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition To Application For Certification" filed August 21, 1972, by KTBS–TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition To Application For Certification" filed August 21, 1972 by KSLA–TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That Tri-Cities Cable Company, Inc.'s application for Daingerfield, Texas (CAC–796) IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
OLVIE E. SISK, IVOUS T. SISK AND JOEL E. CAMP, DOING BUSINESS AS TRI COUNTY BROADCASTING COMPANY, EUPORA, MISS.	Docket No. 19026 File No. BP-18016
RALPH MATHIS AND AUBREY FREEMAN, DOING BUSINESS AS RADIO TUPELO, TUPELO, MISS.	Docket No. 19027 File No. BP-18220
For Construction Permits	

ORDER

(Adopted January 19, 1973; Released January 22, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. The Review Board having under consideration petition for leave to amend to update application pursuant to Section 1.65 of the Rules, filed on December 27, 1972, by Radio Tupelo;

2. IT APPEARING, That no objections to acceptance of the amendments have been filed within the time allowed therefor;

3. IT IS ORDERED, That the above petition for leave to amend IS GRANTED and the amendment therein IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-54

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re VALLEY CABLEVISION CORP., MARSHALL COUNTY, IND. For Certificate of Compliance	CAC-658 IN073

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 29, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On June 12, 1972, Valley Cablevision Corp. filed an application (CAC-658) for a Certificate of Compliance for a new cable television system to serve an unincorporated area of Marshall County, Indiana.[1] Valley Cablevision requests certification for carriage of the following television signals:

WNDU-TV	(NBC)	South Bend, Indiana
WSBT-TV	(CBS)	South Bend, Indiana
WSJV	(ABC)	Elkhart, Indiana
WTTW-TV	(Educ.)	Chicago, Illinois
WGN-TV	(Ind.)	Chicago, Illinois
WFLD-TV	(Ind.)	Chicago, Illinois
WSNS	(Ind.)	Chicago, Illinois
WCIU-TV	(Ind.—Foreign language and ethnic)	Chicago, Illinois

Advance Brands, Inc., which holds a non-exclusive cable television franchise for the City of Plymouth in Marshall County, Indiana, filed an opposition and two amendments thereto.[2]

2. Advance Brands argues that a grant of the above-captioned application would potentially violate Section 76.501(a) of the Commission's Rules[3] since Valley is equally owned by the licensees of three

[1] Although Valley Cablevision's franchise is for all of Marshall County, it here seeks a certificate of compliance for an area five miles outward in all directions from the city limits of Plymouth, Indiana.

[2] Advance Brands, Inc., also filed a petition for special relief directed against Plymouth CATV Services' application for certificate of compliance (CAC-442) for the City of Plymouth, Indiana (Plymouth CATV Services is a subsidiary of Valley Cablevision Corp.), and filed a motion to consolidate CAC-442 and CAC-658. On October 26, 1972, the Commission granted Plymouth CATV Services' application (CAC-442) and denied the petition for special relief and the motion to consolidate. *Plymouth CATV Services, Inc.*, FCC 72-953, — FCC 2d —.

[3] Section 76.501(a) of the Rules provides that,

"No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

(1) A national television network (such as ABC, CBS, or NBC); or

(2) A television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers); or

(3) A television translator station licensed to the community of such system.

television broadcast stations which place predicted contours over Plymouth;[4] that the cross-interest here involved apparently was in existence prior to July 1, 1970, and hence need not be disposed of before August 10, 1973; that a grant of the application will either allow a later sale of the certificate at a higher price—thus allowing a form of trafficking in franchises—or furnish the basis for a waiver of Section 76.501 of the Rules which is not otherwise warranted; and that the application should therefore be denied.

3. As we stated in *Plymouth CATV Services, Inc.*, FCC 72-953, ——— FCC 2d ———, "we have never delayed system operation simply because of eventual need to comply with the cross-ownership rules." Valley has several options by which it might meet the requirements of Section 76.501 of the Rules. We will not withhold certification solely on the basis of an argument that the applicant might choose to sell the cable system to comply with our rules. No request for waiver of Section 76.501 is before us so it seems premature to anticipate its disposition.

In view of the foregoing, the Commission finds that a grant of the subject application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC-658) filed June 12, 1972, by Valley Cablevision Corp., IS GRANTED.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certificate of Compliance" filed August 7, 1972, by Advance Brands, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] Michiana Telecasting Corp., licensee of Station WNDU-TV, South Bend, Indiana; South Bend Tribune, licensee of Station WSBT-TV, South Bend, Indiana; and Truth Publishing Co., licensee of Station WSJV, Elkhart, Indiana.

F.C.C. 73-20

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
WGBH EDUCATIONAL FOUNDATION, SPRINGFIELD, MASS.
For Waiver of Section 74.631(d) of Commission Rules

JANUARY 4, 1973.

WGBH EDUCATIONAL FOUNDATION,
Television Station WGBY-TV,
One Armory Square,
Springfield, Mass.

GENTLEMEN: This refers to your request of November 13, 1972, for a waiver of section 74.631(d), subpart F, part 74 of the Commission's rules concerning the multiplexing of additional educational aural program material of WGBH-FM, Boston, Massachusetts, for delivery to WFCR-FM, University of Massachusetts, Amherst, Massachusetts, via an existing television intercity relay system licensed for use for television station WGBY-TV, Springfield, Massachusetts.

The Commission has concluded that a grant of your waiver request would be warranted, provided that the operation of your television intercity relay stations WII-65, WII-66, and WII-67 be conducted in accordance with the following condition:

In no event shall television intercity relay stations WII-65, WII-66 and WII-67 be operated solely for the purpose of relaying the signals of WGBH-FM, Boston, Massachusetts, to station WFCR-FM, University of Massachusetts, Amherst, Massachusetts.

Accordingly, your request for a waiver of section 74.631(d) is hereby granted, subject to the condition that the intercity relay stations aforementioned be operated in the manner set forth above. A copy of this letter must be posted with the authorizations of these television intercity relay stations.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1002

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WKBN BROADCASTING CORP. For Renewal of Licenses for Stations WKBN, WKBN-FM and WKBN-TV, Youngstown, Ohio	File Nos. BR-306, BRH-580 and BRCT-229

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 15, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING. COMMISSIONER REID CONCURRING IN THE RESULT. COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (i) a petition for reconsideration, filed August 30, 1971, by the Black Broadcasting Coalition of Youngstown, Ohio; (ii) an opposition to the petition for reconsideration, filed September 27, 1971, by WKBN Broadcasting Corporation; and, (iii) the Black Broadcasting Coalition's October 22, 1971, reply to WKBN Broadcasting Corporation's opposition pleading.

2. To place the instant petition in proper perspective, a brief statement concerning the background of this proceeding will be helpful. As noted in the caption above, WKBN Broadcasting Corporation, hereinafter WKBN, is the licensee of WKBN, WKBN-FM and WKBN-TV, all of which are located in Youngstown, Ohio. On July 6, 1970, WKBN timely filed applications for renewal of its licenses for WKBN, WKBN-FM and WKBN-TV (File Nos., BR-306, BRH-580 and BRCT-229, respectively). On August 27, 1970, the Commission granted the Black Broadcasting Coalition of Youngstown, hereinafter the BBC, a 45-day extension of the September 1, 1970, cut-off date for filing petitions to deny WKBN's license renewal applications. See 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.580(i). This action was taken because the BBC and WKBN were engaged in discussions in an attempt to resolve the BBC's questions at the local community level. However, when discussion failed to culminate in an acceptable agreement, the BBC, on October 1, 1970, filed separate petitions to deny WKBN's aforementioned license renewal applications for WKBN, WKBN-FM and WKBN-TV.

3. In its petitions to deny the BBC raised substantially similar allegations against each station. Briefly, these allegations concerned WKBN's community survey, past and proposed programming, and employment practices. WKBN responded to the BBC's charges in an

opposition pleading filed October 14, 1970, and the BBC filed a reply to WKBN's opposition pleading on November 4, 1970.

4. After full consideration of the BBC's petitions to deny and reply pleading, WKBN's opposition pleading, and the license renewal applications for WKBN, WKBN–FM and WKBN–TV, the Commission, by Memorandum Opinion and Order adopted July 23, 1971, released July 30, 1971, found that the BBC had failed to raise any substantial and material question of fact which would warrant designating WKBN's license renewal applications for hearing. Thus, the BBC's petitions to deny were denied and the license renewal applications for WKBN–FM and WKBN–TV were granted; the license renewal application for WKBN–AM remained on deferred status for other reasons. See *WKBN Broadcasting Corp.*, 30 FCC 2d 958 (1971). Then, on August 30, 1971, the BBC timely filed the instant petition seeking reconsideration of the Commission's initial decision.

5. BBC, in its petition for reconsideration, request the Commission to set aside its grant of WKBN's license renewal applications and, thereafter, designate the renewal applications for WKBN–AM–FM–TV for evidentiary hearing. In support of its request, BBC contends that the petition to deny and the Commission's decision evidence the existence of a number of disputed issues of fact concerning WKBN's community survey, past and proposed programming, commercial practices, employment practices, public service announcements, community calendar announcements, the size of Youngstown's Spanish-surnamed population, and the discontinuance of WKBN–FM's CBS affiliation agreement. BBC asserts that these disputed issues of fact cannot be resolved until an evidentiary hearing is held on WKBN's license renewal applications. BBC argues, however, that the Commission's decision appears to be based on a presumption of WKBN's adequacy of performance and a requirement that this presumption be overcome by an overwhelming factual showing. BBC continues that this position gives no weight whatsoever to the views of minority groups or to the views of the community as a whole and, further, that the posture adopted by the Commission in its opinion is strikingly similar to the "curious-neutrality-in-favor-of-the-licensee" for which the Court of Appeals for the District of Columbia reversed the Commission in *Office of Communication of the United Church of Christ* v. *FCC*, 425 F. 2d 543, 547 (1969).

6. The BBC also invokes the concept of summary judgment as discussed in the Commission's Notice of Proposed Rule-Making in Docket No. 19141, 27 FCC 2d 426. BBC argues, in this respect, that it could not provide in its petition to deny and reply pleadings the detailed evidence which it would be able to furnish at a hearing, that a major reason for this is the difficulty in obtaining evidence concerning a licensee's past practices at the pleading stage, and, therefore, that the Commission should allow great latitude for general allegations in petitions to deny. BBC continues that, once ". . . general allegations of undisputed materiality have been raised by a petition to deny . . .," the Commission should not resolve the issues ". . . at least until and unless discovery procedures are made available . . . to enable . . . [a petitioner] to make more specific those general allegations of fact.

7. In conclusion, BBC states that the Commission erred insofar as the conclusions set forth in paragraphs 35–41, inclusive, and paragraphs 43–45, inclusive, of its *Memorandum Opinion and Order, supra*, are concerned; and, further, that the Commission's decision is deficient since it does not make the statutory finding that the public interest, convenience and necessity will be served by renewal of WKBN's license renewal applications.

8. WKBN, in its opposition, submits that the Commission's initial decision should be affirmed and that the BBC's petition for reconsideration should be denied. In short, WKBN contends that the Commission properly found that the BBC had failed to establish with the degree of specificity required by Section 309(d)(1) of the Communications Act of 1934, as amended, that substantial and material questions of fact exists which require an evidentiary hearing on WKBN's license renewal applications. As to BBC's position that the Commission should allow for general allegations so as to permit the use of discovery procedures, WKBN notes that a broadcast licensee must maintain locally for public inspection a copy of the renewal application along with related pleadings and correspondence (47 C.F.R. 1.526). WKBN also notes that a licensee is required to publish and broadcast a notice announcing the filing of the renewal application and information as to when and where comments may be made by the public. WKBN notes further that, ". . . any interested party can undertake an air check on a station's programming to ascertain its nature and responsiveness to local needs." WKBN contends, therefore, that ". . . an interested local citizen group has available sufficient information to prepare a meaningful petition to deny which is fully supported by material evidence concerning the licensee's efforts to operate in the public interest" (Opposition, p. 19). WKBN concludes that the petitioner's failure to raise a substantial and material question of fact was caused not by a lack of information but, rather, by ". . . the overwhelming evidence of record . . ." which supports a finding that the licensee operates the stations in the public interest.

9. Finally, WKBN observes that the *Notice of Proposed Rule-Making* which is cited by the BBC is directed to providing the means for summary judgment following discovery procedures *only* ". . . on the basis of evidentiary materials obtained *after the case is designated for hearing*". The licensee concludes by arguing that any question of pre-designation discovery procedures would be more appropriately raised in a rule-making proceeding rather than in this proceeding.

10. BBC, in reply, concedes that the Commission can deny petitions to deny without a hearing where the petitioners have failed to raise a substantial and material question of fact. The BBC asserts, however, that the two cases cited by WKBN (*Miner's Broadcasting Service, Inc.*, 20 FCC 2d 1061 (1970), and *Gulf Television Corporation*, 22 RR 2d 978 (1971) are inapposite. BBC argues that, *contra* to the facts in those cases, its petitions contained material allegations of fact which were challenged by the licensee for ". . . lack of specificity and supporting detail." Citing *Office of Communication of the United Church of Christ* v. *FCC*, 359 F 2d 994 (D. C. Cir., 1966), the petitioners argue that "[t]he Commission should welcome petitioners seeking hearings,

particularly those representing significant community interest groups and acting on behalf of the public."

11. Referring again to the Notice of Proposed Rule-Making in Docket No. 19141, BBC contends that a distinction must be drawn to reflect the apparent difference between a pre-designation finding of "no material and substantial question of fact" and an identical post-designation finding which could be made after discovery should the proposed summary decision rules be adopted. In reviewing the Commission's authority to deny a petition to deny without benefit of a hearing in light of the proposed rules, the petitioner concludes that ". . . a lesser degree of specificity is required to obtain a hearing than is required to resist a motion for summary judgment after discovery has been permitted." BBC avers that it has met the minimum requirements by ". . . alleg[ing] misconduct and presenting some evidence to support these charges" and that now the FCC must fulfill its ". . . affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest" (*Office of Communication of the United Church of Christ* v. *FCC*, 425 F. 2d 543, 548) Reply p. 6). In this regard, the BBC states that "[t]he law is unyielding on the affirmative obligation of Federal administrative agencies to maximize public participation in their proceedings." Because of the importance of issues and the public interest viewpoint presented by its petitions to deny, BBC contends that the Commission can only act ". . . after a hearing is ordered, when the full panoply of discovery, examination and cross-examination is available . . . ." The Commission should not, argues BBC, frustrate public interest groups by subjecting their petitions to ". . . an excessively strict interpretation [which] frustrates the participation of listeners by erecting bureaucratic barriers."

CONCLUSIONS

12. Initially, we are prompted by BBC's argument, as presented in the pleadings before us, to review the standards and procedures which govern Commission action on renewal applications. Our Congressional mandate requires that petitioners adhere to certain pleading requirements before it becomes necessary to designate an application for hearing. Section 309(d)(1) of the Communications Act of 1934, as amended, provides for grants without hearing where the Commission finds that, after consideration of the application and all relevant pleadings, there are no substantial and material questions of fact and that a grant of the application will serve the public interest. The statute also provides that, where a petition to deny is filed, it must ". . . contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent . . ." with the public interest. Should the petitioner fail to make this showing, the Commission may dispose of the petition by a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition, 47 U.S.C. § 309(d)(2).

13. We first address ourselves to BBC's contention that the Commission should allow great latitude for general allegations in petitions to deny. Section 309(d) of the Act forecloses our consideration of such

a suggestion. It is well established that the allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by general affidavits, are insufficient to require an evidentiary hearing. *Chuck Stone* v. *Federal Communications Commission*, D.C. Cir. Case No. 71–1166, June 30, 1972, *rehearing denied* September 1, 1972; *Hartford Communications Committee, et al.* v. *Federal Communications Commission*, D.C. Cir. Case No. 72–1171, August 14, 1972; S. Rept. No. 690, 86th Cong., 2d Sess., p. 12 (1960). The Commission, of course, is aware of the concern being expressed by minority groups about the responsiveness of the broadcast media to their local problems. For this reason we have consistently encouraged community-broadcaster discussions throughout the license term as the best and most effective method of resolving local problems and improving local service. However, if members of the public choose to wait until the end of a license term and then petition to deny renewal, they must meet the strict pleading requirements of Section 309(d). The Commission, in evaluating such a petition, cannot and will not ignore or waive Section 309(d) standards to accommodate petitioners in their efforts.

14. Further, we are persuaded that community groups can without discovery procedures make specific allegations of fact concerning a broadcaster's performance. Clearly, any interested party can monitor a station's performance to ascertain the nature of his responsiveness to community needs. In the context of the present proceeding, however, it appears that the BBC has not undertaken this step to evaluate WKBN's overall performance. There is no evidence from any monitored week, nor is there a long history of complaints of failure to serve local community problems, including minority problems. There are no facts which imply the existence of a policy of illegal racial discrimination or a history of programming misconduct. Instead, it appears that the BBC has merely relied upon information contained in WKBN's license renewal applications and responsive pleadings in an effort to substantiate its allegations. As a result, petitioner's allegations were either lacking the requisite specificity or otherwise failed to raise a substantial or material question of fact. A hearing, of course, is not required to resolve issues which the Commission finds are either not substantial or material regardless of whether the facts involved are in dispute. Nor is a hearing necessary where the facts required to resolve a question are not disputed and the disposition of a petitioner's claim turns not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be drawn from those facts, *Chuck Stone* v. *Federal Communications Commission*, *supra*.

15. With the exception of the matters discussed above, BBC has failed to offer any new facts to support its contention that there exist substantial and material questions of fact which require designation of WKBN's license renewal applications for hearing. Instead, BBC merely expresses the opinion that the Commission erred in each of its earlier conclusions regarding WKBN's community survey, past and proposed programming, the size of Youngstown's Spanish speaking population, commercial practices, employment practices, public service

announcements, community calendar announcements, and the discontinuance of WKBN–FM's CBS affiliation agreement.

16. We need not, of course, consider again matters which have already been presented, considered, and disposed of. *The Spartan Broadcasting Co.*, 22 FCC 2d 920 (1970). Nevertheless, we have reviewed our initial *Memorandum Opinion and Order, supra*, in light of BBC's petition for reconsideration, to determine whether we erred in reaching our determination that the BBC had failed to raise any substantial and material question of fact which would warrant designating WKBN's license renewal applications for hearing. Based on that review, we find no reason to disaffirm our earlier decision; and, therefore, the BBC petition will be denied.

17. Accordingly, IT IS ORDERED, That the petition for reconsideration filed herein by the Black Broadcasting Coalition of Youngstown, Ohio, IS DENIED, and that the Commission's action of July 23, 1971, released July 30, 1971, granting the above-captioned applications for Stations WKBN–FM and WKBN–TV IS REAFFIRMED as being in the public interest, convenience and necessity; the renewal application for WKBN–AM will remain on deferred status for other reasons.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS CONCURRING IN PART; DISSENTING IN PART

In Re: Renewal Proceedings in Youngstown and Columbus, Ohio.

I concur with the majority on these cases insofar as its holding that the petitions to deny filed by the respective community groups do not attain—or candidly, even proximately attain—the procedural standard of specificity mandated by the Communications Act.[1] It is a hackneyed, but nonetheless true, legal bromide that bad cases make bad law. Vague invective and wide-brush critique in a legal pleading requiring factual precision provide the (justifiably) ideal juridical basis for dismissal. Interested parties must dig deep, make the effort to pinpoint and factually support the exact abuses of which they complain so as to render summary rejection, with attendant loss of credibility, illegal if not impossible.

My point of departure and dissent from my colleagues stems from the fact that the perceived deficiencies in the petitioners' pleadings eliminates only inadequate petitioners from the renewal byplay—it in no way eliminates the Commission itself. As the principal monitors of broadcaster performance, we have the main statutory duty to investigate licensee activities; especially when confronted with earnest

[1] Specifically, 47 U.S.C. § 309(d)(1). It must be conceded that Congress intended a strict standard when amending the statute to permit petitions to deny. Congress expected:
". . . a substantially stronger showing of a greater probative value is necessary now in the case of a post grant protest. The allegations of ultimate, conclusionary facts or mere general affidavits . . . are not sufficient." S. Report No. 690, 86th Cong., 1st Session, p. 3 (1959).
See *Stone* v. *F.C.C.*, Case No. 71–1166 (D.C. Cir. June 30, 1972). But see, *Marine Space Enclosures, Inc.* v. *FMC*, 137 U.S. App. D.C. 9, 18 (Note 22) (1969) where the court observed that "[P]rocedural requirements depend in part on the importance of the issues before the agency."

complaints from the neighbors. The Commission frequently acts on its own volition in withholding renewals when it suspects delinquencies. It should not stand behind a procedural barrier on the apparent side of a licensee and let the matter ride simply because a complainant is without the assiduity, resources or legal acumen to mount a perfect attack.[2] Rather, the Commission should be on all sides looking critically in; not at the quality of the complainants' performance—we do not license complainants—but at the activities of the station.[3]

Accordingly, while I don't believe the Commission's action here is wholly unwarranted, it certainly could have gone further in fulfilling its own statutory function in these cases.

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[2] That the Commission need not depend solely on the procedural sufficiency of denial petitions in determining the propriety of license renewal is clearly enunciated in 47 U.S.C. § 307. In pertinent parts, that Section provides that the Commission "may officially notice" (§ 307(d)(2)) facts and circumstances and if the Commission is "for any reason unable to make the [public interest, convenience and necessity] findings specified . . . it shall formally designate the application for hearing on the ground or reason then obtaining". It is axiomatic that before the Commission can find "any reason" it must first look.

[3] For an astringent reminder of the Commission's appropriate role in these renewal triangles, see Judge Burger's opinion in *Office of Communications of the United Church of Christ* v. *F.C.C.*, 138 U.S. App. D.C. 11, 425 F. 2d 543 (1969).